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FORM of PROCESS

Edinr. IN THE May 12. 1777

Court of SESSION,

AND

Court of TEINDS.

To which is prefixed,

A General Account of the COLLEGE OF JUSTICE.

By JOHN RUSSELL, Clerk to the Signet.

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PREFACE.

THE adminiſtration of juſtice with diſpatch, and at a ſmall expence, has ever been an object of the attention of the legiſlature, as well as of the judges; but the multiplicity of rules which have been made for that purpoſe, has, in ſome meaſure, prevented the good effect of them. Rules for proceedings in courts of law ſhould be ſimple and few. If they are not ſo, the complete execution of them becomes almoſt impracticable; and, by a relaxation in part, the authority of the whole comes to be ſhaken.

At preſent, the rules for proceedings in the Court of Seſſion are ſo intricate, and the ſeveral acts and orders made relating to them, are ſo numerous, that the ſtudy thereof is become extremely difficult and laborious.

To remedy this inconvenience, an attempt is made in the following ſheets to abridge that labour, by a proper arrangement of the ſeveral acts and orders now in force, leaving out ſuch as

are become obſolete, and bringing the whole within a narrow compaſs.

In this arrangement, the order of time in which the ſeveral ſteps of proceſs occur, is obſerved; and a few obſervations are, with great diffidence, made upon ſuch parts of our forms as ſeem to need amendment.

The Lords of Seſſion being likewiſe Commiſſioners for plantation of Kirks and valuation of Teinds, and that buſineſs being carried on much in the ſame manner as the buſineſs of the Court of Seſſion, it is thought proper alſo to ſubjoin the form of proceſs in that court.

The great attention given at preſent by the judges to the quick diſpatch of buſineſs, gives reaſon to hope, that ſome new regulations may be made to ſhorten the duration, and leſſen the expence of law-ſuits. If, by bringing the whole rules of proceeding under one view, the author ſhall be ſo fortunate as to contribute, in any degree, towards the obtaining theſe ends, he will think his labour well beſtowed.

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ABBREVIATIONS EXPLAINED.

Act reg. Act of parliament concerning the regulation of the judicatories in 1672; and articles of regulation concerning the ſeſſion, made by King William in 1695 and 1696.

A. S. Act of Sederunt.

St. In. Lord Stair's Inſtitutions of the law of Scotland.

Hope's pract. ob. Sir Thomas Hope's practical obſervations on the law of Scotland.

ERRATA.

Pag. 2. *lin.* 21. *for* ; and the *read* . This

Pag. 36. *marg. for* 1692. *read* 1695.

Pag. 72. *marg. for* Act 1686. *read* p. 1686.

Pag. 8. *Inſtead of what is contained between lin.* 11. *and lin.* 17. *read as follows*, viz.

Formerly during the vacation of the court of ſeſſion, no inferior judge could hold courts for civil cauſes without a diſpenſation from the court of ſeſſion; but now ſheriffs are an exception from that rule. Theſe diſpenſations are, *&c.*

20 Geo. II. c. 43. § 29.

A GENERAL ACCOUNT OF The COLLEGE of JUSTICE.

ANCIENTLY many cauſes, particularly complaints againſt the judges ordinary, were heard by the King and council. But this having been found inconvenient, a new court, named the *Seſſion*, was eſtabliſhed by James I. in 1425, for determining ſuch cauſes. J. I. p. 2. cap. 45. J. I. p. 3. c. 65.

This court, which was only occaſional, and ambulatory, fell ſoon into diſuſe; and by two ſeveral acts of James III. in 1469 and 1475, complaints againſt the ordinary judges were ordered to be tried before the King and council. J. III. p. 1469, c. 26. J. III. p. 1475, c. 62.

In 1487, proceſſes at law being greatly multiplied, and being brought before the King and council in the firſt inſtance, it was found neceſſary to remedy this inconvenience,

A

J. III. p. 1487, c. 105. convenience, by providing, that no actions ſhould be tried by the King and council, excepting the King's own cauſes; and actions and complaints made by kirkmen, widows, orphans, and pupils; actions of ſtrangers of other realms, and complaints made againſt officers for default in the execution of their office, or where the officers themſelves are parties.

The council mentioned in theſe acts of parliament was not the privy council: it was called the *daily council;* and was afterwards ordered to ſit in Edinburgh, or ſuch other place as the King ſhould appoint, to decide all manner of ſummonſes in civil matters, complaints, or cauſes, daily as they ſhould happen to occur; and the council is declared to have the ſame power as the Lords of Seſſion had.

J. IV. p. 1503, c. 58.

In the year 1532, the College of Juſtice was inſtituted by James V. And in 1534 it was ratified by the Pope, and was afterwards confirmed by parliament in the 1537. This court

J. V. p. 1537, c. 36.

court having come in place both of the court of ſeſſion and daily council, the judges in court had the appellation of *Lords of Council and Seſſion*; they were alſo called *Lords of Seſſion*, or, *Senators of the College of Juſtice.*

It appears from the firſt act of inſtitution, that the College of Juſtice then conſiſted of the judges and ſervants of the court, the clerks to the ſignet, and ſome advocates or procurators of beſt name, knowledge, and experience, admitted under the name of *general procurators of the council, to procure in all actions.* The number of theſe advocates was limited: which ſeems to have been unneceſſary at that time; for though by the ſtatute ten are allowed, yet there are only eight named: ſuch was the ſcarcity of lawyers of knowledge and experience in that age. To ſupply this defect, as well as to regulate the admiſſion and conduct of advocates thereafter, it is provided by the ſaid act, That " gif any other cun-
" ning men will deſire to be admit-

" ted to the office of advocation " and procuration, they ſal be re- " ceived, with advice of the Lords, " for completing of the ſaid num- " ber; and that thir procurators " procure for every man for their " wages, but gif they have rea- " ſonable excuſe."

SECT. I.

Of the Judges.

THE court was at firſt compoſed of a preſident and fourteen ordinary judges, one half churchmen, and the other half laymen, with three or four other Lords to be named by the King. The chancellor, when preſent, was to preſide, and have a vote. The quorum of the judges is declared by the act to be ten, with the chancellor or preſident; and their ſentences are ordained to have the ſame effect as the decreets of the Lords of Seſſion had formerly.

Since the union of the kingdoms, the office of chancellor of Scotland has

has been ſuppreſſed; and the nomination of extraordinary Lords was, in the year 1724, taken away by act of parliament. 10 G. I. c. 19.

The court at preſent conſiſts of a preſident and fourteen ordinary judges, all laymen; whereof nine are a quorum: and in abſence of the Lord Preſident, one of the ordinary judges is named by the court to preſide for the time. At what time this alteration of the quorum happened, does not appear; but from the tenor of the act 1587, impowering the court to judge of the act of oblivion, it muſt have been before that time. J. VI. p. 1587, c. 44.

The judges are named by the King, for life; and undergo a trial: though the court has now no power of rejecting; but if they object, muſt report it to the King; who may over-rule or allow the objection. 10 G. I. c. 19.

By the 19th article of the union of the kingdoms, no perſon is capable to be preſented as an ordinary judge in the court of ſeſſion, excepting ſuch as have ſerved in

the college of juſtice, as advocates, or principal clerks of ſeſſion, for the ſpace of five years, or as writers to the ſignet for the ſpace of ten years. Proviſo, That no writer to the ſignet ſhall be admitted to be a Lord of Seſſion, until he ſhall have undergone a private and public trial, upon the Civil law, before the Faculty of Advocates, and ſhall be found by them qualified for the ſaid office, two years before he ſhall be named to be a Lord of Seſſion. Theſe qualifications are declared to be ſubject to alteration by parliament.

Ch. II. p. 3. 1681, c. 13.

The Lords cannot ſit or vote in cauſes of their near relations; ſuch as father or ſon, brother or ſiſter, whether by conſanguinity or affinity; nor in the cauſe of an uncle or nephew by conſanguinity.

The juriſdiction of the court extends to all civil actions, and in ſome particular caſes, to the inflicting of corporal puniſhment for crimes, ſuch as forgery or fraud.

The

The court, by virtue of a *nobile officium* inherent in it, has the power of judging in equity, as well as in law. It has alſo a power, in the ſecond inſtance, to judge of the interlocutors and ſentences of inferior courts; and, upon ſpecial reaſons, the judges may review even thoſe of their own court. They are likewiſe impowered to make rules and regulations concerning the manner and order of proceeding in their court. Ja. V. 1540, c. 93.

Actions not exceeding 200 merks Scots in value, are, by the act of regulations 1672, diſcharged to be brought before the court in the firſt inſtance, unleſs for ſpecial reaſons, to be ſet forth in the bill, or warrant of the ſummons, and admitted of by the Lord Ordinary, after due conſideration had thereof; " excepting cauſes of the " members of the college of ju- " ſtice, and thoſe of cooks, vint- " ners, and others, in burgh, for " furniture taken off from them, " by ſuch as dwell not within the " ſhire Act reg. 1672, § 16.

" shire where the furniture was " taken off."

The exception in this act is, by the practice, extended to all actions against debtors residing in different shires; and the clause, ordaining the special reasons to be set forth in the bill of the summons, and to be considered by the Lord Ordinary, has become obsolete.

During the vacation of the court of session, inferior judges cannot hold courts for civil causes without a dispensation from the court of session. These dispensations are granted upon an application, by way of common bill, presented by the clerk of the bills to the Lord Ordinary officiating on the bills: and the time of such dispensation was formerly limited to the 20th March, and 20th August; but since the alteration of the style, it is prorogued to the 2d of April, and 2d of September.

Order of court, 21st July 1696

Ditto, 16th Feb. 1753

All judgements and orders of the court must be signed by the President, in presence of a quorum of

Act W. 1693, c. 18.

of the Lords ſitting in judgement; and for that reaſon his Lordſhip always ſubjoins to his ſubſcription, I. P. D.; i. e. *In præſentia Dominorum.*

All the judges except the Lord Preſident ſit by turns weekly in the *outer houſe*, for hearing and determining cauſes in the firſt inſtance; and the court ſits in what is called the *inner houſe*, for the determination of ſpecial cauſes. Act W. & M. ſeſſ. 4. c. 19. & 21.

The Lord who ſits for the week, is called *the Ordinary for the outer houſe.* His ſentences are liable to the judgement of the court, upon application of any of the parties: but if no ſuch application be made within a certain limited time, his deciſion becomes final; and is held a decree of the court, as much as if it had been pronounced by the whole Lords in the inner houſe.

The Lords alſo, by turns, weekly, adviſe all bills praying warrants for ſummonſes and ſummary diligence, and alſo bills of ſuſpenſion and advocation. The Lord ſo officiating is called *the Ordinary*

Ordinary on the bills. This duty requires the attendance of the judges in time of vacation, as well as during the ſitting of the court.

Two of the ordinary judges are alſo appointed weekly, by turns, to attend in the afternoon, for the examination of witneſſes. Theſe Lords are called *the Ordinaries on oaths and witneſſes*; and have the power of judging in all queſtions relating to the taking of proofs; ſuch as, objections to witneſſes, and the propriety of queſtions put to them.

One of the ordinary judges is alſo appointed weekly, by turns, to audite and prepare the proceſſes in which proofs have been taken, and to report a ſtate thereof in writing to the court. The judge ſo officiating is called *the Ordinary on concluded cauſes.*

The interlocutors of theſe Ordinaries, as well as thoſe of the Ordinaries on the bills, are liable to the judgement of the court.

SECT.

SECT. II.

Clerks, and other Officers of Court.

THE clerks of court are twelve in number. Six of them are principal clerks, named by the King. Theſe officiate in the inner houſe. The other ſix act by deputation from the principal clerks, and attend the buſineſs of the outer houſe.

The clerks keep three offices for their papers; in each of which there are two principal, and two depute clerks; and nine extracters, whoſe buſineſs it is to collate and extract the decreets and ſentences of the court; which extracts are ſigned by one of the principal clerks.

Beſides theſe, there are two principal clerks to the bills, named by the King, and one depute, commiſſioned by them; whoſe buſineſs it is to preſent bills to the Ordinary on the bills, and to write all interlocutors in that department. There are alſo two other

aſſiſtants

assistants in that office, named by the principals.

All these clerks have their commissions for life.

The court also has four macers, whose business it is to call the causes, and to execute the orders of the court. Three of these macers have their commissions from the King; the other is in the gift of Mr Moncrieff of Reedy.

There is likewise a clerk to the minute-book; whose business it is to keep a minute-book of all the proceedings of the court. This officer has his commission from the King, for life.

Next to him are the two keepers of the rolls for the inner and outer house, respectively. The nomination of the first of these was originally in the Lord Chancellor; but since the union of the kingdoms, he has been named by the Lords. The person named is usually the Lord President's clerk; and the act of nomination bears, That he shall hold the one office as long as he continues to serve the Lord

Act reg. 1672, §5.

A. S. 14th June 1760

Lord Preſident in the other, or until a commiſſion ſhall appear, in terms of the act of regulations 1672.

The keeper of the outer-houſe roll is appointed by the Lords, and has his commiſſion for life. Act reg. 1672, § 2. A. S. 16th Nov. 1689

Every one of the judges has alſo a private clerk for keeping his hand-rolls, taking care of proceſſes which are to be adviſed by him out of court, and writing his interlocutors.

The laſt officers are the two keepers of the parliament-houſe; the nomination of whom is ſettled by contract between the Lords and the Magiſtrates of Edinburgh; by which it is agreed, that theſe two bodies ſhall have a power of nomination alternately. A. S. 23d June 1694. Ibid. 29th June 1757.

The court has alſo a common ſeal: which is never uſed but upon particular occaſions; ſuch as reports to his Majeſty or parliament, and commiſſions for taking proof in foreign parts.

The court of ſeſſion is ordered to ſit down on the 1ſt of Novem- J. VII. P. 1686. c. 5.

ber, and to rise the last of February, for the winter-session; and to sit down for the summer-session on the 1st of June, and to rise the last of July.

24 G. II. c. 23. In the act for changing the style, the sitting of the session is excepted; so that the winter-session commences now upon the 12th November, and ends the 11th March; and the summer-session commences the 12th June, and ends the 11th of August.

2 Geo. III. c. 27. The Lords, by a late act, are impowered to adjourn the session, on such day, betwixt the 20th December and 20th January, yearly, and for such time, as they shall judge expedient, not exceeding the space of twenty days.

The court sits every week-day during the session, Monday excepted.

SECT. III.

Faculty of Advocates.

THE profession of an advocate, ever since the institution of the

the college of juſtice, has been honourable. Out of this body, almoſt excluſively, the Judges of the court of Seſſion and Juſticiary, and part of the Barons of Exchequer, are nominated; and they have the ſole privilege of being appointed Sheriff-deputes in the ſeveral counties.

It has already been mentioned, that, by the firſt inſtitution of the court, advocates were to be admitted by the judges; and it appears, from many petitions to the court, ſo late as the year 1664, that advocates, upon their entry, were not ſubjected to an examination. The ordinary method of education of young gentlemen intended for the bar, was, by ſerving advocates in practice for a number of years; after which, upon an application to the court, ſetting forth their ſervice, and a certificate from his Majeſty's advocate, and the other advocates, of their honeſty and abilities, they were admitted to the office of procuration.

Minutes of Faculty, Nov. 7. 1664. This method was afterwards altered, and advocates, before their admiſſion, were obliged, either to undergo an examination by the Faculty in the Civil law, or to pay an additional ſum at their entry.

By an act of the Faculty, 1ſt January 1678, the fees of entering advocates were ſettled, at 500 merks for ſuch as ſhould enter upon examination; and 1000 merks for ſuch as ſhould enter, upon petition to the Lords, without examination. This act was afterwards ratified by an act of ſederunt: but with a reſerved power to the Lords to modify the 500 merks, when they ſhould find it reaſonable.

A.S. 18th Jan. 1684.

A. S. 6th July 1688 By another act, in 1688, the method of trial laid down by the Faculty of Advocates is again approved; and it is thereby ordered, that for the future, when any perſons ſhall apply to the Lords to be entered advocates, without undergoing the ordinary trial, they ſhall be examined by the Lords in preſence,

ſence, concerning their knowledge of the ſtyles, the form of proceſs, and of the principles of the law of Scotland.

Act of Faculty, 5th Jan. 1720.

In 1720, the fees of entering advocates were raiſed to L. 40 Sterling; and, by a late regulation, advocates, before their admiſſion, are ſubjected to a trial of their knowledge, both in the Civil law, and in the Municipal law and practice of Scotland.

A. S. 28th Feb. 1750.

The office and duty of an advocate is ſo well known, and ſo fully deſcribed by many eminent authors on the law, that it is unneceſſary here to recapitulate it.

SECT. IV.

Clerks to the Signet.

THE inſtitution of Clerks to the Signet is as ancient as that of Secretary of State: they are properly his clerks, and act by commiſſion from him, or from the

keeper of the ſignet, when that office is held by a perſon other than the Secretary.

In the old acts of parliament, they are called *Clerks to the Signet*; in later acts, they are ſometimes called *Clerks*; and in other parts of the ſame acts, they are called *Writers to the Signet*.

The admiſſion of a clerk to the ſignet proceeds upon trial of his knowledge, both of the law, and of the form and ſtyle of writings; and the ſociety has a power of rejecting, in caſe upon trial the candidate ſhall not be found qualified. The ſociety has alſo a power of ſuſpenſion or deprivation of their members for malverſation in their office.

No clerk to the ſignet can be admitted without his having previouſly ſtudied the law, and ſerved as an apprentice to one of the clerks to the ſignet for five years: and before he is admitted, he muſt ſwear to his actual ſervice during the whole time of his indenture.

The

The members of this ſociety have the excluſive privilege of preparing and ſigning all writs which paſs the ſignet, with ſome few exceptions; and alſo of preparing and ſigning all bills of advocation and ſuſpenſion. They have alſo the excluſive privilege of preparing and ſigning ſignatures, and other warrants of charters and writs which paſs the other ſeals, and are preſented to the Barons of Exchequer; and they are declared to be ſole clerks to appriſings led upon diſpenſation, and to ſervices before the macers. W. & M. ſeſſ. 5. c. 40. Act reg. 1672. § 23.

From the education and practice of the clerks to the ſignet, in the proper buſineſs of their office, it is, with reaſon, preſumed, that they are much converſant in the art of conveyancing: and therefore they are generally employed and conſulted in the making of ſettlements, tailzies, or conveyances of conſequence.

SECT.

SECT. V.

Perſons intitled to the Privileges of the College of Juſtice.

A. S. 23d Feb. 1687. THE members of the college of juſtice are intitled to certain immunities and privileges, which have been ratified by parliament; and theſe privileges are extended to the ſervants of the members, and to certain other perſons having a connection with the college.

The perſons privileged by the act of ſederunt are,

The Lords of Seſſion.
Advocates.
Clerks of Seſſion.
Clerks of the Bills.
Writers to the Signet.
Depute-Clerks of Seſſion, and one Subſtitute for regiſtrations in each office.
Three Depute-Clerks of the Bills.
Clerks of Exchequer.

Directors

Directors of the Chancery, and their depute.
Two Clerks of Chancery.
Writer to the Privy Seal, and his Depute.
Clerks of the General Regiſter of Seiſins and Hornings.
Macers of the Seſſion.
Keeper of the Minute-Book.
Keepers of the Rolls of the outer and inner houſe.
One actual Servant * of each Lord of Seſſion.
One Servant of each Advocate.
Four Extractors in each of the three offices of the Clerks of Seſſion.
Two Servants employed by the Clerk-Regiſter for the keeping of the public regiſters.
Keeper of the Seſſion-Houſe, and Keeper of the Advocates Library.

By the act for eſtabliſhing the court of exchequer in Scotland, it is provided, that the Barons of 6 Ann. c. 26. § 11.

* The perſons mentioned as ſervants in this act are writing clerks.

Exchequer

Exchequer in Scotland, and members of the ſaid court, ſhall have the ſame privileges and immunities as the members of the college of juſtice have; excepting only that they may be purſued in juſtice before the Lords of Seſſion, for cauſes not competent to the court of exchequer.

SECT. VI.

Agents and Solicitors.

THough agents and ſolicitors, by their office, are not members of the college of juſtice, they are ſo neceſſarily connected with the buſineſs of the court, that it may be proper here to take notice of them.

While the education of young gentlemen intended for the bar, depended on their ſerving advocates in practice, theſe young gentlemen, during their ſervice, acted as agents, and their maſters directed the conducting of the proceſſes;

proceſſes; and therefore all other agents were diſcharged, as burdenſome to the lieges. But ſince that practice has ceaſed, agents have become abſolutely neceſſary; and they are now held by the court to be the ſole conductors of proceſſes, and as ſuch, anſwerable for every omiſſion or wrong done in the management of them: for which reaſon the penalties and fines formerly impoſed upon the advocates, are now laid upon the agents. Act reg. 1672. § 31.

The office of an agent or ſolicitor is a very great truſt. He is generally the original adviſer of the action. The advocate takes his information from him, and gives his opinion according to the caſe or memorial prepared by the agent. The proceeding in or delaying of the cauſe muſt depend upon the agent, and the advocate does not move one ſtep without him. It is therefore of great importance to the client, that the agent be a man of integrity, knowledge, and ſkill in his profeſſion, willing

willing and able to conduct the proceſs fairly and properly for his client, with ſuch candour as to avoid all trick and chicanery, and to prevent all frivolous, vexatious, or unneceſſary law-ſuits.

The agenting-buſineſs being open to every one without diſtinction, many perſons who were not bred in the law, undertook that branch of buſineſs; by which great inconveniencies aroſe. To remedy theſe, the court, in 1754, made an act of ſederunt, prohibiting all perſons, excepting clerks to the ſignet, and firſt clerks to an advocate, to act as agents in cauſes before the court, unleſs they ſhall have been inrolled as ſuch, after paſſing an examination by one or two of the judges.

A. S. 10th Aug. 1754

This was a moſt judicious regulation: but it is worth conſideration whether it ſhould not have gone farther, and ſettled, as far as poſſible, the fees of ſuch agents, not only for the benefit of the ſuitors, but alſo for an encouragement to men of character to undertake

undertake the agenting-buſineſs, which includes a moſt important truſt.

In the ſame view it were to be wiſhed, that in impoſing fines, the acts of ſederunt had always made a diſtinction between defaults that appear intentional, or owing to groſs neglect, and thoſe which are not ſo. In the former it is not only proper that the ſuffering party be indemnified, but alſo that, for the ſake of example, a fine be given to the poor. But when the fault is neither intentional nor groſs, though perhaps attended with loſs to the adverſe party, the fine ſhould only go to make up ſuch party's damage.

The Lords private clerks, and the ſervants of the Clerks of Seſſion, are diſcharged to act as agents, excepting in their maſters and their own proper cauſes. A. S. 7th Nov. 1690

Extracters are alſo diſcharged to act as agents, and agents are prohibited to act as extracters. A. S. 4th Jan. 1751.

FORM of PROCESS

In the Court of SESSION.

PART I.

Proceſſes commenced in the court of Seſſion.

CHAP. I.

Preliminaries of Proceſs.

THE preliminaries of proceſs conſiſt of the ſummons, which contains the libel, citation given to the defender *, execution or return of the meſſenger, and the proceedings before the hearing of the cauſe by the Lord Ordinary.

A ſummons is a writ in the King's name, and under his ſignet. The form of it is well known by the clerks to the ſignet, who have the ſole and excluſive privilege of ſigning and iſſuing all

* Defendant.

ſummonſes before the court of ſeſſion. In general, it muſt contain a recital of the purſuer's claim *, and a concluſion for a decreet; the terms of which ſhould be accurately ſet forth in the libel.

The ſummons muſt alſo contain a warrant for citing the defender to appear at a time certain, to ſhew cauſe why decreet ſhould not paſs againſt him; with certification, that if he ſhall not appear, decreet ſhall go out againſt him, in terms of the libel.

J. III. p. 1. c. 6. To give the defender time to prepare his defence, and to attend the court, in ordinary proceſs, twenty-one free days are allowed him after citation, before the firſt day of compearance, in caſe he reſides in any part of Scotland.

J. VII. p. 1. ſeſſ. 1. c. 43. Orkney and Shetland are excepted from this rule. If the defender reſides there, he is allowed forty days notice.

Some proceſſes, by their nature, require extraordinary diſpatch.

* Plaintiff's claim. The word *complainer* is alſo often uſed inſtead of *purſuer*.

In

In theſe the law has allowed a ſhorter warning to the defender than twenty-one days; and for that reaſon ſuch ſummonſes are ſaid to be privileged. Anciently theſe ſummonſes were not preciſely aſcertained, and were iſſued only by ſpecial warrant of the court, upon a bill offered for the purſuer; but afterwards they were particularly defined and ſettled by act of ſederunt. A. S. 29th June 1672

Privileged ſummonſes on one diet of fifteen days.

1. Summons of recent ſpuilzie, if raiſed within fifteen days after the committing of the ſpuilzie. Ibid.
2. Summons of ejection.
3. Summons of intruſion, and ſucceeding in the vice.

Privileged ſummonſes on two diets of ſix days each.

1. Summons of aliment, Ibid.
2. exhibition,
3. forthcoming,

4. Summons of transference,
5. poinding of the ground,
6. wakening,
7. ſpecial declarator,
8. ſuſpenſion,
9. preventor,
10. tranſumpt, and
11. removing.

Summonſes inſtructed by writing require only one diet *; but when the purſuer's title is not inſtructed by writing, and is to be verified by a proof *pendente lite*, the ſummons muſt contain two diets. Anciently theſe laſt ſummonſes alſo contained only one diet; and when the ſummons was called, the purſuer obtained a new warrant from the court to cite the defender to a peremptory day. This was called *ſummons of continuation.* But this method being found inconvenient, was diſcharged; and it was made lawful to include both

Ch. II. p. 2. ſeſſ. 3. c. 6.

* Day of appearance.

firſt

firſt and ſecond diets in the original ſummons.

Before the act of Charles II. any perſon, as ſheriff in that part, appointed by the ſummons, might have given a citation to the firſt diet; but in ſome caſes the citation to the ſecond diet behoved to be by meſſengers at arms. By that act the ancient method of execution is preſerved, and ſummonſes are ordained to be directed to ſheriffs in that part, and meſſengers at arms, reſpectively; and two different citations were neceſſary. But by an act in 1693, one citation is allowed to be given for both diets at one time, by a meſſenger at arms. W. & M. p. 1693. c. 12.

The ſecond diet, when the defender reſides in Scotland, is upon ſix days warning.

If the defender reſides in Edinburgh or Leith, the ſecond diet may be upon twenty-four hours warning. A. S. 29th June 1672.

By an act of ſederunt in 1672, ſummonſes containing two diets were ordered to be ſigned by the clerk- A. S. 11th July 1672.

clerk-regiſter; or, in his abſence, by one of his deputes, or the ordinary clerks of ſeſſion. This act was looked upon as an infringement of the privileges of the clerks to the ſignet; and accordingly, by an act of parliament in 1695,

Act W. p. 1. ſeſſ. 5. c. 40.

" for reviving and preſerving the " good order that ought to be " kept in the paſſing of writs un- " der the ſignet, it is ſtatute and " ordained, that all writs paſſing " under the ſignet, called *the ſig-* " *net of the Lords of Seſſion*, be ſub- " ſcribed by a writer, *as clerk to* " *the ſignet*; excepting allenarly " letters of diligence in proceſſes " before the ſeſſion: and the keep- " er of the ſignet is diſcharged to " affix the ſame to any letters not " ſubſcribed as above, any cuſtom " or practice to the contrary not- " withſtanding."

J. V. p. 154. c. 75.

If the defender reſides in Scotland, he muſt be cited, either perſonally, or at the place where he has his actual reſidence for the time. But if he does not reſide in Scotland, the ſummons muſt contain

tain a warrant to cite him edictally at the market-croſs of Edinburgh, pier and ſhore of Leith, upon ſixty days warning for firſt diet, and fifteen days for the ſecond diet.

The execution of the meſſenger muſt bear expreſsly the names and deſignations of all the parties, purſuers and defenders; and muſt be ſigned by the meſſenger and two witneſſes. Ch. II. p. 2. ſeſſ. 3. c. 6.

The defender muſt be ſerved with a full copy of the libel, in ſo far as concerns him. A. S. 16th Feb. 1723.

In the laſt act, the following ſummonſes are excepted from that rule.

Summons of adjudication,
of mails and duties,
of ranking and ſale,
of exhibition *ad deliberandum*,
for chuſing curators,
of tranſumpt,
of wakening,
of multiple-poinding, and
of poinding of the ground.

But

But in the laſt of theſe, the heritor muſt get a full copy of the libel; though it is unneceſſary to give ſuch copy to the tenants.

A. S. 1ſt Jan. 1726. Summons of forthcoming was afterwards added to the exceptions.

To avoid the confuſion that often happens in actions againſt debtors, where a multitude of debtors are called, it is provided by the act of regulation 1695, that there ſhall not be above ſix defenders called in the ſame ſummons. When ſuch ſummonſes are firſt called, a roll of all the defenders muſt be put up on the wall of the outer houſe.

Act. reg. 1695. § 28.

The firſt part of this rule is gone into diſuſe, and ſummonſes are raiſed againſt any number of defenders. But by the practice of the court, the ſummons can only be called againſt ſix of the defenders at one time, in the outer-houſe roll; by which means great confuſion ariſes from having different Ordinaries to one proceſs.

By

By the act inſtituting the college of juſtice, ſummonſes were ordained to be called according to the order of a table, *i. e.* roll. To aſcertain the time of tabling, the clerk marked the date of tabling upon the ſummons; for which he received a fee. This order of calling ſummonſes was altered by the act of regulations 1672; but the form of tabling is yet continued, upon account of the clerk's fee. J. V. p. 5. c. 44.

Both diets of the ſummons muſt be in time of ſeſſion, and muſt be paſſed before the ſummons can be tabled.

The laſt part of this rule occaſions an unneceſſary delay. There appears to be no reaſon why the ſummons ſhould not be allowed to be called upon the firſt day of compearance. Anciently the ſummons was called upon that day, and a new warrant was granted for citing the defender to a ſecond diet. By the preſent practice, the purſuer reaps no benefit, in point of diſpatch, by allowing the two diets to be included in one ſummons:

mons: but if the ſummons were allowed to be called upon the elapſe of the firſt diet, the preliminaries of out-givings and returns might be proceeded in during the running of the ſecond diet.

Summonſes containing only one diet are not tabled.

After the ſummons is tabled, it muſt be called by the clerk in the outer houſe; and if there be no compearance for the defender, the ſummons may be inrolled in the next week's regulation-roll. Though this calling is not in preſence of the judge, and the appearance is only entered by an advocate's clerk, in name of his maſter; yet it is held to be a judicial ſtep of procedure, ſo as to keep the proceſs alive. But this can only be done once.

Act reg. 1690. § 21.

A. S. 26th Feb. 1718

If an appearance be made for the defender, the clerk marks the advocate's name who appears for him.

The ſummons, with the writings founded on by the purſuer, muſt be given to the defender's advocate

advocate to be conſidered; and, to prevent the loſs of papers, as well as to aſcertain the time of giving out the ſummons, a minute is marked on the back of the ſummons, and ſigned by the purſuer's advocate, mentioning the date of outgiving, and the whole writings given to the defender's advocate; who is obliged to return them to the purſuer's advocate within ſix days thereafter, with a minute ſigned by him, bearing the date of return, and that he has ſeen and returned the proceſs. A. S. 28th Feb. 1662. Act reg. 1672. § 20.

At the ſame time, there muſt alſo be returned to the purſuer's advocate, the defender's exceptions or defences to the libel, ſigned either by the defender himſelf, or by his advocate. Theſe defences ſhould contain an acknowledgement or denial of the facts libelled, otherwiſe the facts ſhall be held as acknowledged. If at the calling by the clerk, an advocate is, by miſtake, marked for the defender who is not employed by him, the return muſt bear, that he is not for A. S. 16th Feb 1723.

the party; in which caſe the proceſs is inrolled in the regulation-roll.

By the act of 1723, the defender is ordained to give in both his dilatory and peremptory defences; but by an act in July 1729, the defender is not obliged to give in his peremptory defences, until the dilatory defences are diſcuſſed. Which occaſions delay: for altho', by this laſt act, when dilatory defences are ſeparately returned, the defender, before the calling of the cauſe by the courſe of the roll, is ordered to conſign in the clerk's hands 20 s. Sterling, to be given to the purſuer's agent, upon receipt, ſo ſoon as the dilatory defences ſhall be over-ruled; yet that part of the act is not obſerved.

A. S. 1ſt July 1729.

By an act of ſederunt in 1726, it is ordered, "That the defender, "in his anſwers or defences to be "returned with the proceſs, ſhall "particularly ſet forth at length "the ſtate of the fact and caſe, as "he admits and acknowledges it "to be; as alſo the whole facts "upon

A. S. 1ſt Jan. 1726. § 5.

" upon which he is to found and
" plead any defence: and if, by
" reaſon of new diſcovery, the de-
" fender be obliged to alter any
" part of his anſwers or defences,
" that he give in that alteration in
" writing forty-eight hours at leaſt
" before hearing; and, in that
" caſe, he ſhall be obliged to pay
" 30 s. at leaſt of coſts to the pur-
" ſuer: and that in the ſame man-
" ner, if the purſuer ſhall be o-
" bliged to amend any part of his
" libel, he ſhall likewiſe give in
" the amendment in writing, ſo
" as the defender may have op-
" portunity to ſee it forty-eight
" hours before hearing, and ſhall
" pay the foreſaid ſum at leaſt of
" coſts to the defender: and that
" the giving in of ſuch amend-
" ments and alterations, whether
" upon libel or defences, be inti-
" mated by the clerk in the outer
" houſe, at the intimation of the
" bills, and that the intimation be
" marked by the clerk on the back
" of the amendment."

The laſt part of this rule is now in diſuſe.

A. S. 19th Feb. 1742

Theſe three laſt acts were at firſt only temporary, but are now made perpetual; and the obſervance of them would tend greatly to the diſpatch of buſineſs. They were founded chiefly on the act of regulations 1672, which contains many wiſe regulations, and ſhows great abilities and knowledge of buſineſs in the perſons who were concerned in the making of them.

Act reg. 1672 § 22

By the regulations 1672, it is provided, "That where-ever the "defender's advocate is to found "any defence upon writs * at the "returning of the proceſs, he alſo "produce therewith the writs "whereupon he intends to found "any alledgeance, and give in the "defence which he founds upon "theſe writs, and mark the parti-"cular clauſes of the writs where-"upon he founds; otherwiſe no

* The word *writ* is here, and in many other of the acts, uſed in a general ſenſe, and comprehends every kind of writing.

"reſpect

" reſpect is to be had to the al-
" ledgeance * to be founded on
" thoſe writs which were in any
" of the defender's advocates
" hands, or which, or any copies
" thereof, were ſeen by the ſaid
" advocates: which the purſuer's
" advocates ſhall be obliged to re-
" turn within four days after they
" receive the ſame, otherwiſe com-
" plaint may be made againſt
" them, as againſt defenders ad-
" vocates for keeping up of pro-
" ceſſes; and in caſe any other
" writs come to their hands after
" the returning of the proceſs up-
" on which they will found, that
" in like manner they produce the
" ſame to the purſuer's advocates
" before calling of the cauſe, un-
" der the ſame certification."

If there are more defenders than one, the advocate to whom the ſummons is given out, ſhall return the proceſs within four days; which ſhall lie in the clerk's hands for ſix days thereafter, to be ſeen by

Act reg. 1672. § 2.

* Allegation.

all the other defenders before the ſummons can be inrolled. Theſe other defenders ſhould alſo give in their exceptions to the libel, ſigned as before mentioned, within the ſaid ſix days. But this laſt part of the act is now in diſuſe.

A. S. 16th Feb. 1723

If the advocate for the defender ſhall refuſe to return the proceſs within the time limited, upon complaint of the purſuer, the Lord Ordinary on the bills will grant warrant for apprehending and incarcerating the advocate or agent who detains the proceſs, until he ſhall return it.

Act reg. 1672. § 20

The act of regulation 1672, authoriſes the Lord Ordinary on the bills to call the advocate who keeps up the proceſs, and to fine him in L. 3 Scots for each day the proceſs is kept, after requiſition thereof by a notary, and L. 6 Scots for each day it is kept after the complaint is given in; one half of which fines is appointed to be paid to the purſuer, and the other half to be put into the poor's box but there is no power given by this

this act to the Lord Ordinary to impriſon the offender.

It does not appear when the practice of granting warrants for impriſoning members of the court, for detaining papers, began; but it ſeems to be neceſſary for preſerving the authority of the court. The firſt time ſuch warrants are mentioned in the printed acts of ſederunt, is in Nov. 1691; but from the recital of that act, the practice of granting warrants ſeems to have been eſtabliſhed before that time. A. S. 11th Nov. 1691

The detention of papers in proceſſes ſeems to have been the ſubject of conſtant complaint. Sir Robert Spottiſwoode, Preſident of the Seſſion, in a ſpeech made to the advocates in 1633, complains much of it, and threatens to put the ſtatutes made againſt it in execution; but does not mention what theſe ſtatutes were. There are alſo many acts of ſederunt made ſince that time, for preventing this evil practice; to moſt of which, penalties, by way of fine, are A. S. 29th Jan. 1640. 10th Jan. 1643. 15th Dec. 1643. and 21ſt Nov. 1649.

are annexed. Theſe acts appear not to have been effectual; but ſince warrants for impriſoning the perſon who detains the proceſs have been introduced, the practice of detaining papers has, in a great meaſure, ceaſed.

A. S. 11th Nov. 1691 The party againſt whom the warrant is granted, is obliged to ſatisfy the macer who executes the warrant, for his trouble.

If a ſummons ſhall not be called within year and day of the laſt day of compearance, the action will fall of courſe, and no proceedings can be had in that ſummons: but if the defender ſhall not chuſe to lie under the uncertainty of attendance, after the days of compearance are elapſed, he may put up a proteſtation in the minute-book for not inſiſting; and if the purſuer ſhall ſuffer the proteſtation to be extracted, the proceſs ſhall be at an end; though it is competent to the purſuer to raiſe a new proceſs upon the ſame grounds.

A

A calling by the clerk will ſtop the extracting of this proteſtation: but it may be renewed for not inrolling; and ſuch new proteſtation will have the ſame effect as the former, if the cauſe is not inrolled in due time.

To prevent undue preference of one cauſe to another, books of inrolment are ordered to be kept, both for the inner and outer houſe, in which all cauſes muſt be inrolled; and the judges are ordered to proceed according to the order of ſuch inrolment. Act reg. 1672. § 2. 5. 6. & 7.

Two of theſe books are appointed for the outer houſe; in one of which is contained the roll of ſuſpenſions, advocations, removings, ejections, and recent ſpuilzies. This generally paſſes under the name of the *ſuſpenſion-roll*, and is called upon Tueſday and Wedneſday. Ibid.

By the preſent practice, removings, ejections, and recent ſpuilzies, are inrolled in the ordinary action roll.

The

The other book contains the roll of the outer-houſe cauſes. This roll is called the *ordinary action roll.* In the firſt part of this roll are placed ſummonſes where no compearance is made for the defender, and proceſſes upon warrant for diſcuſſing reaſons of reduction. Theſe cauſes are commonly called upon Wedneſday, immediately after the ſuſpenſion-roll is finiſhed. This part of the roll goes under the name of the *regulation-roll,* being appointed by the acts of regulation.

Act reg. 1672. § 11.

Act reg. 1695. § 21.

The keeper of theſe rolls is ordered to attend in the ſeſſion-houſe each Saturday afternoon during the ſeſſion, to receive the notes of inrolments, and to mark the date of the inrolment on the proceſs; which muſt be ingroſſed in the book according to the date of the return, by the defender's advocate. It is alſo his duty to affix on the wall of the outer houſe, each Monday, a roll of cauſes, according to the order of the book, which are to be heard that week.

Act reg. 1672. § 2. and 3.

The

The keeper of the rolls is alſo ordered to attend to inrol cauſes the laſt Saturday of the Chriſtmas vacance. A. S. 24th Dec. 1763

The method of inrolling is, by giving a note to the keeper of the rolls for the outer houſe, who marks the date of the inrolment on the ſummons, and inrolls the cauſe in the book.

Proceſs at the inſtance of miniſters for payment of their ſtipend, proceſs of wrongous impriſonment, and proceſs againſt inferior judges, who neglect to put in execution the laws made for preſervation of the fiſhing, are intitled to ſummary diſpatch, without abiding the courſe of the roll. W. p. 1. c. 27. Act 1701. c. 6. Act 1705. c. 2.

The rolls of ordinary actions, and of ſuſpenſions in the outer houſe, are ordered not to be called upon the laſt nine ſederunt-days of the winter-ſeſſion, and laſt ſeven ſederunt-days of the ſummer-ſeſſion; but the regulation-roll and acts are allowed to be called during all theſe days. A. S. 16th Feb. 1723 § 3. *Vide* Acts of litiſcontestation.

CHAP.

CHAP. II.

Ordinary Proceſs before the Lord Ordinary in the outer houſe.

SECT. I.

Proceedings before an interlocutor is pronounced.

WHen a proceſs is called before the Lord Ordinary in the outer houſe, if the purſuer is not ready to inſiſt, the proceſs ſhall be deleted out of the roll, and not continued to the next week's roll; but if the defender demand it, he is intitled to a proteſtation: the effect of which is, that the defender ſhall not be obliged to anſwer without a new ſummons, and receiving payment of the proteſtation-money; which is uſually modified to 10 s. Sterling.

Act reg. 1672. § 10. A S. 20th Dec. 1690

Though the act of parliament is peremptory, this proteſtation is uſually recalled upon application by

by the party to the Lord Ordinary, before the extracting of the proteſtation; but the defender is intitled to inſiſt for payment of 10 s. before the purſuer can be heard. A. S 20th Nov. 1711 § 5.

If the defender is abſent when the cauſe is called in the courſe of the roll, the purſuer is intitled to proceed in the cauſe, and to get decreet, in caſe his libel is proved; but if a proof is required, a term will be aſſigned for proving the libel; and the defender ought not to be reponed againſt that ſentence or interlocutor, but upon payment of 20 s. to the purſuer. Ibid.

Theſe penalties are ſeldom inflicted, which occaſions many delays to the parties.

If the advocate for either party be in the inner houſe when the cauſe is called before the Lord Ordinary in the outer houſe, the Lord Ordinary ſhall call the cauſe next day, if deſired by a note from either party. Act reg. 1672. § 10.

Decreets in abſence of the defender, paſs of courſe when demanded;

manded; and it is uſual, in making out the extracts of ſuch decreets *, when the defender has been perſonally cited, to recite, that the purſuer had referred the verity of the libel, in ſo far as not proved by the writings produced, to the defender's oath, and that the defender having failed to appear, was held as confeſſed. Tho' this is only the manœuvre of the extracter, without any warrant in the proceedings to authoriſe it, the decreet ſhall be held good until it is ſuſpended or reduced. But when a reference to the defender's oath is really intended, ſuch reference ſhould regularly be ingroſſed in the minutes; and the interlocutor ſhould bear, that the defender was held as confeſſed, in reſpect of his not appearing.

Upon this head, it may not be improper to obſerve, that if a party is held as confeſſed upon any point

* Extract of a decreet is an authenticated copy of the proceedings and decree, made out in a particular form by an extracter, and ſigned by one of the principal clerks.

referred

referred to his oath, and circumduction is granted after appearance has been made, and a day taken by an advocate for him to depone; in caſe of the death of ſuch party before he is reponed, the circumduction ſhall ſtand good without remedy. It therefore behoveth advocates to be very certain of their authority, before they enter ſuch appearance. This caution is thought neceſſary, becauſe at preſent ſuch an appearance is held to be a matter of mere form, and conſequently very little attention is given to it.

It is a common device of defenders who want delay, to ſuffer decreets to paſs in abſence againſt them, and then to offer a repreſentation to the Lord Ordinary, praying to be heard on their defences. By this ſhift, the determination of cauſes is greatly poſtponed, and much unneceſſary trouble is given to the Lord Ordinary, in reading repreſentations, which contain nothing material in the cauſe. This inconvenience

would probably be in a great meaſure remedied, if all repreſentations againſt decreets in abſence were diſcharged, (excepting againſt ſuch decreets as may happen to be pronounced upon the laſt ten days of a ſeſſion, where repreſentations may be neceſſary to prevent extracting the decreet); without prejudice to the defender, either to apply for redreſs to the Lords in the inner houſe by petition, or, upon a warrant to be obtained from the clerk in the proceſs, to inroll the cauſe in the next week's regulation-roll for a hearing. And it would make this rule more effectual, if the clerk were ordered not to grant ſuch warrants for inrolment, unleſs the defender ſhall previouſly lodge in the clerk's hands all his defences, both dilatory and peremptory, and ſhall conſign a certain ſum in name of damages, to be delivered to the purſuer's agent, upon receipt, when demanded, without fee or reward, and without the neceſſity of an application to the court

court for a warrant. And the like regulation may be made with reſpect to the conſignation of the ſum for the purſuer's damage, in caſe a defender ſhall offer a ſuſpenſion, or raiſe a reduction of a decreet in abſence.

If this ſhould be made a rule, it would be neceſſary, when there are more defenders than one in a proceſs, that each defender ſhould be named in the roll for the outer houſe; that parties agents may have proper notice to attend to the defence of their clients.

When both parties are ready, the purſuer's advocate proceeds to recite his libel, and the vouchers of it; and the defender proceeds next to open his exceptions to the libel in their proper order.

Theſe exceptions may be either dilatory or peremptory.

Under the firſt of theſe heads are comprehended,

1. Exceptions to the competency of the juriſdiction of the court.

2. Perſonal exceptions to the judge.

Theſe two are properly declinatory defences.

3. Exceptions to the form of citation or execution.

4. Exceptions to the purſuer's title to carry on the action.

5. Exceptions to the form and competency of the action.

6. Exceptions to the proceeding, becauſe all parties having intereſt are not called.

7. Exceptions perſonal to the defender, *viz.* That he does not repreſent the perſon who was the original debtor to the purſuer.

A. S. 1ſt July 1729. Theſe, and other dilatory defences, ſhould be diſcuſſed before proceeding to the peremptory exceptions; becauſe if the defender ſhall proceed to plead his peremptory defences, he will be underſtood to have paſſed from his dilatory defences.

A defence is ſaid to be peremptory, when it is ſuch, as the deciſion thereof ſhall put an end to the cauſe.

By an act of ſederunt in 1711, it is ordained, that all dilatory defences

defences ſhall be proponed at one time; and theſe being diſcuſſed, all peremptory defences, or other allegations, ſhall be proponed at leaſt before any application to the Lords in preſence; with certification, that no new allegation or defence ſhall be heard, unleſs it become recently to the proponer's knowledge or obſervation; in which caſe, the proponer is to pay a fine to the other party for his expence, to be modified as there ſhall be cauſe: and in all caſes where it is pretended that an allegation is but recently come to obſervation, the ſame ſhall be inſtructed by oath, and no otherwiſe. A. S. 20th Nov. 1711 § 16.

When an allegation is offered to be inſtructed *ſcripto*, if either the purſuer or defender is poſſeſſed of the writings by which he means to prove his allegation, and ſhall not produce them immediately, or ſhall ſuffer a term to be aſſigned, or a diligence to be granted for recovering writings in his own cuſtody, the perſon having ſuch writings Ibid. § 17.

tings ſhall pay a fine to the other party, to be modified by the judges, not under 40 s.

A. S. 20th Nov. 1711 § 5. & 6. By the ſame act it is ordered, that advocates be ready to debate at the firſt calling of the cauſe; and that all writings in the hands of either party, not formerly produced, ſhall be lodged in the clerk's hands twenty-four hours at leaſt before any cauſe ſhall be called, either in the outer or inner houſe; and the particular clauſes of the ſaid writings upon which parties intend to found any allegation, ſhall be marked; and the clerks are ordered to give

Ibid. § 7. up no writings, but upon receipt, and to recall all ſuch writings as have been given up, by caption, if neceſſary, before a proceſs is called.

By this act it is alſo ordained, that either party who ſhall detain ſuch writings, ſhall be fined in 15 s. Sterling at leaſt.

At the calling of the cauſe in the courſe of the roll, if the dilatory defences are over-ruled, the defender

defender ſhall immediately thereafter, at the ſame hearing, repeat his peremptory defences before the Lord Ordinary; and ſhall, without delay, give in the inſtructions of theſe defences, in ſo far as they are to be proven by writings in the defender's hands. A. S. 1ſt July 1729.

If the cauſe ſhall be fully heard at the firſt calling, and facts all ſettled, the Lord Ordinary will either give judgement; or, in caſe of difficulty, will report the matter to the Lords: but if the proceſs ſhall not be then ripe for a deciſion, his Lordſhip will again hear the cauſe at the ſide-bar.

For aſcertaining the time of theſe ſide-bar hearings, the keeper of the outer-houſe roll is ordered to affix on the wall of the outer houſe, each Monday morning, a note of the particular days, hours, and names of the Lords, who are reſpectively to be Ordinaries at the ſide-bar for that week; and the rolls of cauſes to be called by each Ordinary reſpectively, are appointed to be made up and ſigned A.S. 11th Nov. 1708

ed by his own clerk, and affixed on the wall the night before the roll is to be called; in which roll the number of cauſes is to be ſpecified, and no addition ſhall be made to the roll.

A. S. 23d Nov. 1752. The time for putting up this roll is now fixed to be twelve o'clock in the day preceding the calling of it.

This notice to parties is too late; becauſe, in the common courſe of buſineſs, it is almoſt impoſſible to get matters properly prepared for the hearing: it were therefore to be wiſhed, that the time of notice were enlarged, and that the hand-rolls were ordered to be put up forty-five hours at leaſt before the calling.

The due execution of the ſeveral acts relative to the giving in and proponing defences, would greatly tend to the ſhortening of proceſſes, and would in a great meaſure render the after hearings at ſide-bars unneceſſary. This ſeems to have been the opinion of the commiſſioners who formed the regulations

gulations in 1695; by which all side-bar hearings are discharged, and in lieu thereof, the Lord Ordinary is ordered to call the causes he has not finished the preceding days of that week, on Saturday betwixt ten and twelve, at the fore bar. Act reg. 1695. § 13.

But although this excellent statute was complied with, in so far as it ordained the causes not finished on the preceding days of the week, to be called on Saturday; the hearings at the side-bar were still continued, and new rules were made concerning the order of calling such causes. A. S. 11th Nov. 1708

These rules were afterwards altered by a subsequent act, which ordains, that the court shall not sit till ten o'clock in the morning; and that three Ordinaries shall sit each sederunt-day betwixt nine and ten in the morning, at three different bars, for discussing their hand-rolls. A. S. 16th June 1733

This act was at first temporary, but was afterwards made perpetual. A. S. 5th June 1734

Side-

A. S. 16th Feb. 1723. § 3. 6th June 1733. Side-bar rolls are not allowed to be called during the laſt four days of the winter-ſeſſion, and laſt two days of the ſummer-ſeſſion.

Theſe ſeveral regulations of the ſide-bar hours, have not anſwered the end propoſed by them. The multiplicity of cauſes called at different bars at one time, creates great confuſion, and is often the occaſion of delay; for it frequently happens, that the ſame advocate and clerk are called to two different bars at the ſame time.

Upon this head, it may not be improper to obſerve, that quick diſpatch in all proceſſes, in a great meaſure, depends upon the regularity of the proceedings in the beginning: it were therefore to be wiſhed, that the ſeveral acts relating to the returning and proponing defences, were duly obſerved, and that all cauſes were fully heard by the Lord Ordinary at the firſt calling in the outer houſe. A judgement would then be obtained at firſt hearing, if the matter in diſpute be clear; and, in caſe of difficulty,

difficulty, if, inſtead of a minute, which is often difficult to be ſettled by the parties, each party were ordered to give in a full memorial of his caſe, both of fact and law; and if from theſe an accurate ſtate of the facts founded on by each party were made out, the Lord Ordinary would then have a full view of the cauſe, ſo as either to give his own judgement, or to report the caſe to the Lords. This method would alſo be attended with another convenience, that in all the after proceedings, reference would be had to the ſtate of facts, whenever a diſpute ſhould happen relative to them.

This ſtate might be made out by the clerk's ſervant for which he ſhould have a fee allowed; and it might be in this form:

Claſs 1. Facts admitted by all parties.

Claſs 2. Facts vouched by writing, diſtinguiſhing by whom the allegation is made, and referring

to the particular clauſe by which each fact is vouched.

Claſs 3. Facts alledged by the purſuer, and denied by the defender.

Claſs 4. Facts alledged by the defender, and denied by the purſuer.

In this ſtate, reference ſhould be made to the pages of the reſpective memorials and writings from whence it is taken.

When two or more proceſſes are anywiſe connected, the proceſs firſt inrolled is held to be the leading proceſs; and the Lord Ordinary, at calling the ſubſequent proceſſes, will remit them to it *ob contingentiam.*

Proceſſes remitted in this manner remain diſtinct proceſſes, tho' depending before the ſame Ordinary, unleſs they are alſo conjoined; and therefore a proceeding in one of them ſhall not prevent the other from ſleeping.

All interlocutors and ſentences must be ſigned by the judge; and by an act of ſederunt, interlocutors

J. VII. p. 1. ſeſſ. 2 cap. 3.

tors in abſence are ordered to be ſigned by the Lord Ordinary the ſame day they are pronounced; and interlocutors upon debate, to be ſigned within ſix days thereafter at fartheſt. A. S. 9th July 1709.

Interlocutors pronounced on the four days preceding the two laſt days of a ſeſſion, muſt be ſigned within forty-eight hours of their being pronounced; and interlocutors pronounced the two laſt days of a ſeſſion, muſt be ſigned the ſame day they are pronounced. Ibid. Ibid.

No interlocutor can be ſigned after the riſing of the ſeſſion. Ibid.

When interlocutors are not ſigned of the true date they are pronounced, the clerk is ordered to prefix to the minute the true date of the debate, and of pronouncing the interlocutor, and below the interlocutor to add the date of ſigning it. Ibid.

Interlocutors not ſigned according to the rules preſcribed by this act, are declared to be void and null. Ibid.

SECT. II.

Of repreſentations to the Lord Ordinary.

THE party who is diſſatisfied with an interlocutor, muſt offer a repreſentation to the Lord Ordinary, praying an alteration of the judgement, within ten ſederunt-days of the ſigning of the interlocutor; otherwiſe the interlocutor ſhall become final, unleſs the party ſhall alledge he has come to the knowledge of ſome new fact, which he did not know before; and which allegation muſt be proved.

A. S. 16th Feb. 1723. § 2.

In reckoning the ſederunt-days in the outer houſe, Saturday is included; in petitions to the inner houſe, it is excluded. *Vide* Petitions, chap. 3. § 2.

Repreſentations againſt decreets entirely in abſence, may be preſented at any time before extracting the decreet.

Anciently,

Anciently, the Lords uſed to ſtop the extracting of decreets by a verbal order: theſe verbal ſtops were afterwards diſcharged, and ſtops were ordered to be in writing, and to be ſubjoined to repreſentations. Such ſtops are alſo declared not to endure above a fortnight, if granted in time of ſeſſion, and to endure only until the firſt eight days of next ſeſſion are elapſed, if granted in time of vacance, unleſs they are renewed. A. S. 11th Nov. 1708.

The ſigning of interlocutors in time of vacance being now diſcharged, the laſt part of this act has become uſeleſs, and the clauſe limiting the endurance of ſtops has become obſolete. A. S. 9th July 1709.

The Lord Ordinary, after reading the repreſentation, will either refuſe the deſire thereof, or ordain the ſame to be anſwered by the other party; either of which ſhall keep the matter open until a new interlocutor is pronounced.

Every new interlocutor creates a freſh delay, as it is competent to the party who thinks himſelf

injured, to offer a new repreſentation within ten days of the laſt interlocutor; and there being no limitation as to the number of repreſentations, the occaſions of delay are infinite, when parties are litigious.

If parties were fully heard at firſt, repreſentations to the Lord Ordinary would be unneceſſary, unleſs ſomething new ſhould be diſcovered, which they did not know at the time. This was the opinion of the court at making the act of ſederunt in 1756, concerning proceſſes of ranking and ſale; by which all repreſentations are diſcharged. But if repreſentations to Ordinaries ſhall be thought neceſſary, the number of them may be limited; and the order for anſwering may alſo be fixed to a peremptory day, under a penalty, to be paid to the party who ſuffers by the delay. This would ſecure diſpatch, and, at the ſame time, parties would very ſeldom ſuffer any loſs by it. For when, by the ſtrict obſervance of form, a party ſhall

A. S. 17th Jan. 1756. § 10. *Vide* Act reg. 1672. § 15

ſhall be excluded from obtaining material juſtice, the judges will, no doubt, give a remedy: but ſuch remedies ſhould very ſeldom be applied, and only in caſes of abſolute neceſſity; becauſe the loſs to the public, by the bad example, will much overbalance the benefit which a few particulars may receive from the indulgence; and in every caſe of neceſſity, where the form ſhall be diſpenſed with, the party who ſuffers by the delay ſhould be indemnified.

If the Lord Ordinary, after repeated repreſentations, ſhall continue to adhere to his former interlocutor, the party who complains muſt either acquieſce, or apply to the Lords in the inner houſe by petition.

When a repreſentation againſt a decreet pronounced by an Ordinary is refuſed, the decreet formerly pronounced muſt again be put in the minute-book; and the decreet cannot be extracted until the elapſe of three days after the laſt interlocutor A. S. 6th Feb. 1748

locutor has been put in the minute-book.

SECT. III.

Of incident Diligence, and acts of Litiſconteſtation.

WHen parties are not poſſeſſed of the neceſſary writings for proving either the libel, or defences; upon their application, the Lord Ordinary will grant letters of incident diligence againſt havers *; and if the perſon who has the writings, ſhall not produce them within the time limited, after the diligence is executed againſt him, upon reporting the firſt execution a ſecond diligence will be granted; the effect of which is, to

* An incident diligence is a writ in the King's name, and under his ſignet, containing warrant for citing parties and witneſſes, and alſo the holders of writings, to appear in court, and to give evidence of facts, or produce all writings called for, reſpectively.

The ſecond diligence contains a warrant for taking them into cuſtody, for their contempt of the firſt order.

take

take the perſon who has the writings into cuſtody, until he ſhall deliver them.

When parties do not agree as to the truth of the ſeveral allegations made by them, it is competent to either party to inſiſt, that the party who does not admit the facts alledged, ſhall confeſs or deny the truth thereof; and if he ſhall refuſe to anſwer, he ſhall be held as confeſſed; but if he ſhall deny a fact which is afterwards proved to have been known by him, ſuch party ſhall be obliged to pay all the expences, without any modification, which the other party has been put to by his calumnious denial. A. S. 1ſt Feb. 1715 § 6.

When parties perſiſt in denying the facts, the Lord Ordinary will grant warrant for proving their ſeveral allegations; and if this warrant is general, it is called *an act of litiſconteſtation*, which is extracted and ſigned by the clerk; after which, the Lord Ordinary can proceed no further in the cauſe without a warrant from the Lords.

By the ancient practice, the relevancy

levancy was, for the moſt part, determined before pronouncing the act; but now acts are generally allowed before anſwer as to the relevancy, and parties are allowed, not only to prove the facts contained in their mutual condeſcendences and anſwers, but alſo all other facts and circumſtances relative to the cauſe.

Before extracting an act, either party may pray a review of the interlocutor, by preſenting a repreſentation to the Lord Ordinary within ten days, as before mentioned.

If the purſuer ſhall offer to prove his libel, or allegations, by the defender's oath, he muſt furniſh him with an extracted act within forty-eight hours after being required thereto, otherwiſe the defender ſhall be diſmiſſed.

J. VII. p. 1. ſeſſ. 2. c. 10.

When the defenders in exhibitions ſhall depone negatively, and defenders in forthcomings ſhall depone, whether *negativè* or *affirmativè*, the clerks and macers fees ſhall be paid by the purſuers.

Ibid.

This

This act is alſo extended to proceſſes before inferior judges.

Sometimes, to avoid the expence of extracting an act, the Lord Ordinary grants warrant for the proof to be taken upon an incident diligence, to be reported to himſelf; and, in ſuch caſes, the proceſs ſhall continue before the ſame Ordinary, and the proceedings ſhall go on in the ſame manner, as in cauſes where no proof is neceſſary.

The Lords uſed formerly to examine witneſſes themſelves, but for ſome years paſt they have done it by commiſſion.

If the commiſſion for the examination is granted to the clerk, or his ſervant, and is to be executed during the ſitting of the ſeſſion, it may be done by a written warrant upon the proceſs, without extracting the commiſſion: but when the commiſſion is granted to ſome other perſon, it muſt be extracted, and a diligence granted for citing the witneſſes to compear before the commiſſioner.

No

No witneſs can be examined, unleſs he is previouſly cited by a diligence to give his evidence.

Cha. II. p. 1681. c. 9. If a witneſs is under diligence for debt, and is apprehenſive of being taken into cuſtody for it, if he ſhould appear to give evidence, the court, upon a petition, may grant him a protection for a reaſonable time, not exceeding one month, provided the party who requires his evidence, or his tutors or curators if he is a minor, ſhall give his oath of credulity, or ſubſcribe a certificate under his hand upon oath, that the evidence of ſuch witneſs is material in the cauſe.

J. VII. Act 1686. c. 18. Parties, and their advocates, are intitled to be preſent at the examination of witneſſes, and to ſee the depoſitions in the clerk's hands, and get a copy thereof, before adviſing.

The term aſſigned for proving being elapſed, the act muſt be called before the Lord Ordinary in the outer houſe for the time; who, at the ſuit of either party, will

will circumduce the term againſt the other party for not proving; and, at the ſame time, make great aviſandum with the proof adduced.

Againſt this interlocutor, no defence can be offered to the Lord Ordinary, his Lordſhip having no power to judge of the merits of the caſe; but if witneſſes ſhall have been cited who have not appeared, upon reporting the execution of the diligence, the Ordinary will delay the granting circumduction, and will grant a ſecond diligence againſt the witneſſes formerly cited.

After the term of the ſecond diligence is elapſed, the party may again get his act called, and will then obtain circumduction, and aviſandum with the proof; which concludes the proceedings in the outer houſe.

After an act is extracted, and the term for proving is elapſed, the term ſhall not be prorogated, but upon weighty reaſons and unforeſeen accidents, ſufficiently ve- A. S. 1ſt Feb. 1715 § 8.

rified; and the party who aſks the prorogation ſhall, before getting the benefit thereof, pay to the other party the damage and expence occaſioned by ſuch prorogation, as modified by the court.

The application for a prorogation muſt be made by petition to the Lords in the inner houſe.

The acts are called on Wedneſday and Friday at ten o'clock before the Lord Ordinary in the outer houſe; and previous notice is given to the parties, by the clerk's affixing a note of the acts to be called, on the wall of the outer houſe, the day preceding.

When the proof is taken in conſequence of a diligence, to be reported to the Lord Ordinary, the cauſe may be inrolled in his Lordſhip's hand-roll for adviſing the proof. In this caſe, it is regular alſo to circumduce the term; and if the proof is clear, the Ordinary may adviſe it immediately; but if there is difficulty, he will make aviſandum with it to himſelf: and the cauſe ſhall then remain with his

his Lordſhip until he ſhall determine it, in the ſame manner as in caſes where there is no proof taken.

After a cauſe has been once heard by the Lord Ordinary, it ſhall remain before him until it be diſcuſſed, either by an act of litiſconteſtation, proteſtation, or decreet; and if the Ordinary ſhall die during the dependence, all proceedings ſhall ſtop, until a new Ordinary ſhall be named by the Lords. *Vide* Petitions, chap. 3. § 2. Act reg. 1672. § 14.

CHAP. III.

Proceedings before the Lords in the inner houſe.

THE Lords are ordered to adviſe all cauſes with open doors, ſome ſpecial caſes excepted, at the diſcretion of the judges. W. & M. p. 1. ſeſſ. 5 c. 27.

The form of bringing cauſes from the outer to the inner houſe is various, according to the nature and circumſtances of the caſe; and

may be comprehended under the three following heads.

1. Report by the Lord Ordinary.

2. Petition by any one of the parties.

3. Great aviſandum made by the Lord Ordinary.

SECT. I.

Of Reports.

THE form of reporting cauſes by the Lord Ordinary in the outer houſe, has undergone many alterations not neceſſary here to be mentioned, it being now finally ſettled by an act of ſederunt; which ordains, " That when a " Lord Ordinary ſhall take a cauſe " or point to report, he ſhall ap- " point a day for the parties to " put their informations into the " Lords boxes *: That if one of " the

A. S. 29th June 1738

* To avoid ſolicitation, the judges receive no petitions, informations, or other papers, from the ſuitors

" the parties ſhall be ready, and " the other ſhall not be ready, at " the time appointed, the Lord " Ordinary ſhall, in that caſe, au- " thoriſe the party whoſe infor- " mation is ready, to print the " minutes of debate, and ſhall " find and declare the other party " liable to repay to him the ex- " pence of printing the ſame; and " ſhall appoint a new day for put- " ting the ſaid minutes, when " printed, with the information " of the party who had prepared " the ſame, into the boxes; and " ſhall declare, that no informa- " tion ſhall be received for the " party who has been found dila- " tory, without payment to the " other party of an amand, ſuch " as the Lord Ordinary ſhall find " reaſonable, and ſuitable to the " party's contempt, not under the " ſum of 40 s. Sterling."

ors or their agents; but each Lord has a locked box, with a ſlit in it, placed in the outer court, where printed copies of all ſuch papers offered to the court are put in.

A. S. 5th June 1739 & 13th July 1739.

This regulation was afterwards renewed in 1739, and an order made, that as ſoon as the clerk ſhall intimate to the Lord Ordinary, that the proceſs and printed informations of the parties are in his hands, the Lord Ordinary ſhall grant warrant for inrolling the cauſe; and in caſe one of the parties is not ready, upon production of the party's information, and of the copy of the minutes both printed, the like warrant ſhall be granted, and the Lord Ordinary ſhall award ſuch ſummar compulſator for payment of the expence of printing the minutes, and of the amand if incurred, as may be awarded for expences of witneſſes, or other incidental expences of proceſs.

Informations muſt have the name of an advocate ſubjoined to them; and ſhould contain nothing but what is relative to the points contained in the minute of debate before the Lord Ordinary; and therefore, in all reports, the minutes of debate ought to be accurately

A S. 19th Dec. 1710

rately made up by the clerk, at the ſight of the parties.

SECT. II.

Of Petitions and Anſwers.

PEtitions againſt interlocutors of an Ordinary, muſt be preſented within eight ſederunt-days after ſubſcribing the interlocutor complained of; and ſhall not contain any new allegation in law or fact, not inſiſted on before the Lord Ordinary; without prejudice to parties to ſuggeſt new arguments upon the allegations offered to the Ordinary. A. S. 9th July 1709.

In reckoning the ſederunt-days for petitions, Saturday is excluded, excepting the five laſt ſederunt-days of the ſeſſion. A. S. 1ſt Feb. 1715 § 3.

No petition againſt an act or decreet paſſed in the outer houſe ſhall be preſented to the inner houſe, until the party ſhall firſt apply to the Lord Ordinary in the cauſe by repreſentation. Act reg. 1672. § 15

This

This regulation ſeems to comprehend only ſuch petitions as contain new matter not laid before the Lord Ordinary.

A. S. 26th Nov. 1718. No more than one petition ſhall be offered, reclaiming againſt an interlocutor in preſence.

A. S. 1ſt Feb. 1715. § 4. One petition only is alſo allowed againſt an interlocutor of an Ordinary's condemning in, or aſſoilzieing from expences. But it is not competent to reclaim againſt ſuch interlocutor when pronounced by the Lords in preſence.

A. S. 22d July 1743. When an incidental diligence is granted by an interlocutor of the Lords in preſence, and an application for a further diligence, or aviſandum with the proof, is neceſſary, ſuch application ſhall be made by petition to the Lords.

If an Ordinary ſhall die during the dependence of a proceſs before him, either party may apply by petition to have a new Ordinary named by the court.

Incidental petitions which do not complain of an interlocutor, muſt be notified to the parties having

ving intereſt, or to their known advocate or agent in the proceſs, perſonally, twenty-two hours at leaſt before ſuch petition ſhall be moved to the Lords, by delivering a full copy of the petition, with a note indorſed thereon, expreſſing the time when the petition is to be moved, which is to be indorſed on the principal petition, and ſigned by the perſon who intimated it; and a copy of the ſame note, but not ſubſcribed, ſhall be put upon the printed petition given in to the Lords boxes; and the perſon who intimates the petition, is ordered to attend at the bar at adviſing, that he may verify his having given ſuch notice by his own oath, and by the oaths of credible witneſſes, if it ſhall be found neceſſary. A. S. 20th Nov. 1740

By this act, in caſe the agent or advocate to whom the petition is intimated, ſhall deny that he is for the party intereſted, ſuch denial ſhall be mentioned in the intimation; and the party who intimated the ſame ſhall be ready, at

at the time of moving the petition, to verify, that the advocate or agent to whom notice is given, is for the party intereſted, otherwiſe ſuch notice ſhall not be held as legal.

Petitions which, by their nature, require ſecrecy, or ſuch diſpatch as cannot admit of giving ſuch notice, are excepted from this act.

A. S. 15th Jan. 1741. This act was afterwards confirmed, and a penalty of L. 3 Scots annexed to the tranſgreſſing of it.

And the order for perſons who ſhall intimate incidental petitions to attend at the bar when the petition ſhall be moved, was again renewed, under a penalty of 5 s. Sterling.

A. S. 30th June 1743

A. S. 19th Dec. 1739 When petitions or anſwers are given in to the boxes, the proceſs, and alſo the inſtructions of ſingle bills which do not refer to proceſs, muſt be given in to the clerk at four o'clock in the afternoon of that ſame day, at fartheſt, under the penalty of 40 s. Sterling.

A. S. 24th July 1741.

Interlocutors

Interlocutors on petitions ſhall be intimated, by inſerting the deliverance in a book; from which the depute-clerks ſhall, *per vices*, make out a roll, every day, of ſuch deliverances; and ſhall cauſe the roll to be put on the wall of the outer and inner houſe, with a note ſubjoined, expreſſing in what office the book lies: and the book is ordained to be patent to all concerned, without fee or reward. A. S. 10th Feb. 1739

That parties may have notice when their petitions, anſwers, and reports, are to be adviſed by the court, the keeper of the inner-houſe rolls is ordered to keep a book, and to inroll ſuch cauſes in the order they ſhall be preſented by the parties, and alſo to mark the date of inrolling on the margin. A. S. 13th July 1739. § 2. & 3.

By the ſame act, another book is ordered to be kept, wherein are to be inrolled all cauſes that ſhall, upon report, or petitions and anſwers, be appointed by the Lords to be heard in preſence, in the order, and according to the date of the Ibid. § 4. 5.

the interlocutor appointing the hearing.

Ibid. Inſpection of theſe books is allowed without fee or reward; and the roll of the cauſes, according to the order of the book, is ordered to be put up from time to time on the wall of the inner houſe.

From theſe two rolls, the Lords make out a ſhort roll of cauſes to be adviſed *immediately*.

A. S. 29th July 1747. Petitions againſt interlocutors in preſence, and anſwers thereto, are intitled to the ſhort roll, without abiding the courſe of the long roll.

The time for anſwering petitions is generally limited by the interlocutor, and a penalty is uſually annexed to the contravention of the order.

A. S. 16th Dec. 1760 All papers to be put into the Lords boxes muſt be put in before twelve o'clock, each ſeſſion-day.

All papers to be adviſed on Tueſ-

A. S. 10th Mar. 1762 day, muſt be put in the boxes on Saturday before twelve at noon.

Petitions and anſwers muſt all be ſigned by an advocate, or by the party.

The

The clerks are intitled to a fee of 58 s. Scots for each petition or anſwer given in to the court; the receipt of which muſt be marked by the clerk's collector upon the petition or anſwer, before it is preſented. Act reg. 1695. § 2.

Additional petitions, anſwers, informations, memorials, or other writings, not given into the boxes before inrolment, are diſcharged to be given in after eight running days from the date of the inrolment, unleſs by ſpecial appointment of the court, under the penalty of 40 s. Sterl. to the poor. A. S. 10th Nov. 1741

If additional anſwers, replies, or memorials, ſhall be thought neceſſary, after the time limited by the ſaid act is expired, a petition muſt be given in to the court for that effect.

When an anſwer, or any other paper, is not ready to be given in againſt the day aſſigned, the court will prorogate the time, upon a motion made by a note given into the Lord Preſident's box; and a copy of ſuch note muſt alſo be gi- A. S. 29th Jan. 1767

ven in to the box of the clerk to the proceſs; and the proceſs itſelf muſt be returned to him, if borrowed upon receipt.

Order of court, 21ſt Dec. 1765 Petitions for ſequeſtrations, or for money, ſhall not be received upon any of the five ſederunt-days immediately preceding the adjournment of the court for Chriſtmas vacance, nor after the 25th

Ditto, 17th July 1764 of July for the ſummer-ſeſſion, or 20th of February for the winter-ſeſſion.

Ditto, 27th Feb. 1765 The marking of the clerk upon a petition preſented upon the penult day of the ſeſſion, or before, ſhall not keep the reclaiming days open until next ſeſſion, unleſs ſuch petition ſhall be printed, and either put into the Lords boxes, or diſtributed amongſt the Lords, the ſame ſeſſion in which it is marked.

SECT. III.

Of Concluded Cauſes.

Act reg. 1672. § 6. THE keeper of the rolls in the inner houſe is ordered to keep a book of inrolment of concluded cauſes,

cauſes, whereof the probation is to be adviſed by the Lords, to be inrolled according to the date of the concluſion of the cauſe, as the ſame ſhall be preſented by the clerk of the proceſs.

This order not having anſwered the purpoſe intended, by a ſubſequent act it is ordered, That the Lords ſhall name an auditor weekly, for hearing parties on concluded cauſes, according to the order of the roll thereof; who ſhall make a report of the probation in writing, and ſhall mark the particular parts of the oaths or writs inſiſted on, for either party; which report ſhall lie a week in the clerk's hands before adviſing, to be patent to all concerned; and then to be adviſed by the Lords, who are ordered to adviſe ſuch cauſes on Saturdays, and alſo on the afternoons of ſuch other days as the Lords ſhall appoint. W. & M. p. 1. ſeſſ. 4. c. 17.

If the oaths of parties are marked clear by the Lord Examinator, ſuch proof ſhall be adviſed ſummarily. Ibid.

marily, and the cauſe ſhall be inrolled in the ſummary roll.

Act reg. 1695. § 22 This was afterwards extended to proofs by writs or witneſſes.

A. S. 1ſt Nov. 1693 The Lords are ordered to meet weekly *per vices*, in the parliament-houſe, in the afternoon, from three o'clock to five, to hear parties on concluded cauſes.

The report made of the proof is called a *State of the proceſs*.

Act reg. 1695. § 19 The advocates for the parties muſt either object to the Ordinary's report at the time of preparing, or give in their objections within fourteen days thereafter at moſt; and the objections and anſwers ſhall be conſidered by the Lord Ordinary, and ſubjoined to the report. In caſe parties ſhall neglect to give in their objections, they ſhall not be heard thereon at the adviſing of the cauſe, until they conſign an amand of five dollars; and no objection ſhall be made at adviſing, againſt the act, but only againſt the report, as to the points proven or not proven.

The

The clerks are intitled to a fee of one, or two dollars at moſt, for preparing the cauſe, to be modified by the Lord Ordinary. The payment of this fee muſt be vouched by the collector's receipt on the proceſs before adviſing; and each party is bound to pay one half of it. Act reg. 1696. § 7.

The form preſcribed by theſe ſeveral acts being attended with much litigation and delay, the court, of late years, has allowed the proof to be ſtated at large; and to ſupply the want of an arrangement, parties are allowed to repreſent their caſe in memorials to the court. By this means, the preparing of cauſes has become entirely an operation of the clerk's ſervant, who makes up a ſtate of the proceſs and proof as it ſtands, without obſerving any order with reſpect to the points litigated. This ſtate is ſigned by the Lord Ordinary for preparing cauſes, after being inrolled in the roll of cauſes to be prepared; and the cauſe is thereafter inrolled in the concluded

ded cauſe roll; and parties procurators are heard on the proof when the cauſe comes to be adviſed.

The practice of giving in memorials, which generally contain the whole argument at large, gives an unneceſſary trouble to the judges, in reading long arguments, which are again to be reſumed at the pleading.

But if, inſtead of theſe long memorials, parties would give in a ſhort ſtate of the points to be pleaded, referring to the particular parts of the proof on which they are to found their argument, the cauſe would be very well underſtood, and the pleading would be much more effectual.

CHAP.

CHAP. IV.

Proceſs Extraordinary.

SOme proceſſes cannot be adviſed by an Ordinary, but muſt be adviſed by the Lords in preſence. Theſe, with a few other proceſſes, in which the proceedings partly differ from thoſe of ordinary actions, ſhall be treated of under the head of *Proceſs extraordinary*; beginning with thoſe which are particularly mentioned in the acts of regulations, and are ordered to be inrolled in a book to be kept for that purpoſe by the keeper of the inner-houſe rolls, who is ordered to attend in the ſeſſion-houſe each Saturday during the ſeſſion, from two to three in the afternoon, for receiving ſuch inrolments. Act reg. 1672. §5. Act reg. 1672. § 7.

This roll is affixed on the wall of the inner houſe, weekly, on Monday, under the title of, *The ordinary*

ordinary action roll for the inner houſe.

The ordinary actions for the inner houſe, mentioned in the regulations 1672, are,

1. Reductions of heritable rights of lands and annualrents.

2. Declarators of rights of property.

3. Proving of tenors of writings deſtroyed or loſt.

4. *Ceſſiones bonorum.*

5. Hearings ordered by the Lords in preſence, upon report of an Ordinary.

Act reg. 1695. §16 By the regulation 1695, cauſes appointed to be heard, may either be debated immediately, or inrolled as before mentioned: But if a Ibid. §15. certain day is appointed for the hearing, the cauſe ſhall be peremptorily called that day; and a roll of ſuch cauſes is ordered to be made for that purpoſe.

This regulation is not now in uſe; and cauſes to be heard by ſpecial appointment, are ſubjoined to the ſhort roll for the inner houſe by a note, mentioning the particular

particular day the cauſe is to be heard. *Vide* Act of ſederunt, 13th July 1739, § 4. & 5.

SECT. I.

Of Proceſs of Reduction.

DEcreets-arbitral, proceeding on a ſubſcribed ſubmiſſion, ſhall not be reduced at the inſtance of either of the parties ſubmitters, unleſs upon the head of corruption, bribery, or falſehood, to be alledged againſt the arbiters by whom the decreet is pronounced; but if the arbiters ſhall exceed the powers granted to them by the ſubmiſſion, ſuch decreet may be reduced. Act reg. 1695. § 25.

The preliminary ſteps of a proceſs of reduction are the ſame with thoſe of any other proceſs.

If there is no compearance for the defender, the Lord Ordinary will grant decreet of certification; but if the defender appear, and the purſuer's title is ſuſtained, the defender

defender muſt either produce the writings called for immediately, or a day will be aſſigned for production thereof; after the elapſe of which, the purſuer may extract an act, and obtain a decreet of circumduction of the term.

When the writings called for are produced, the Lord Ordinary will make great aviſandum to the Lords, and grant circumduction *quoad ultra.*

Act reg. 1672. § 5. After this interlocutor, the Lord Ordinary can proceed no farther, and the cauſe ſhould be inrolled in the ordinary action roll for the inner houſe, in caſe the reduction is of an heritable right or annualrent; but in lieu of this, a new form has been introduced, by applying to the Lords by petition, praying a remit to the Lord Ordinary to diſcuſs the reaſons of reduction; which is granted of courſe; and the cauſe is remitted to the next week's Ordinary for the outer houſe, and is inrolled in the next week's regulation-roll.

If

If the petition is preſented on Saturday, the cauſe is remitted to the Ordinary on the bills for next week, and ſhall not be called in the roll until the week thereafter.

Note. Theſe remits ſeem to be unneceſſary, and expreſsly contrary to the intention of the act of regulations 1672; and though they are intended for expedition, they often occaſion great delay; for inſtead of having the relevancy determined, or an act before anſwer pronounced by the court at one hearing, parties, before obtaining their act for proving, are frequently obliged to run through the various proceedings of innumerable inrolments, repreſentations, and anſwers, before the Lord Ordinary, and are ſometimes forced to reſort to the Lords in the inner houſe at laſt; whereas if the regulation 1672 were to take place, the additional trouble to the court would be very little; becauſe all the writings founded on by either party are in the field; and the ſingle queſtion then to be tried by the

the court would be, the propriety of admitting a proof of the ſeveral allegations of the parties.

Reductions of decreets which do not concern heritable rights, are not comprehended under the regulations 1672; and yet, by the practice of the court, great aviſandum is uſually made with the writs produced, though no act is extracted; and the Lord Ordinary does not proceed to judge of the reaſons of reduction without a remit from the Lords.

SECT. II.

Of Proceſs of Reduction and Improbation.

THough in enumerating the proceſſes proper for the inner houſe, the act of regulations 1672 does not mention a proceſs of improbation; yet as it is always accompanied with a concluſion of reduction, and has a neceſſary connection

nection with that proceſs, it falls next in order to be treated of; in doing which, we ſhall only mention the particulars wherein the form in carrying on this proceſs differs from that of a ſimple reduction.

Firſt, the ſummons of improbation muſt have the concurrence of his Majeſty's Advocate, both to the bill, or warrant of the ſummons, and to the ſummons: neither of which is neceſſary in a ſimple reduction.

This is a matter of mere form. His Majeſty's Advocate uſually gives a commiſſion to his clerk to ſign theſe concurrences; and he is not thereby precluded from appearing for the defender.

Before the act of ſederunt 1723, the authors of the perſons whoſe infeftments were intended to be reduced, or their heirs in caſe they were dead, behoved to be called as defenders, both in proceſſes of ſimple reduction, and reduction and improbation; but ſince that time, it has been only A S. 16th Feb. 1723 § 3.

neceſſary to call the perſon whoſe infeftment is intended to be reduced.

Act Ch. II. 1672. c. 16. §25. When compearance is made for the defender in a proceſs of reduction and improbation, two different terms muſt be aſſigned for the defender to produce the writings called for; upon each of which an act muſt be extracted: but in a ſimple reduction one term only is neceſſary.

A. S. 1ſt June 1709 After extracting the act for the ſecond term, before decreet of certification is pronounced, judicial intimation muſt be made to the defender, to ſatisfy the production within ten days. This is done by a ſigned interlocutor of the Lord Ordinary upon calling the act.

Act reg. 1695. § 20. When a ſummons of improbation is called in the courſe of the roll in the outer houſe, if there is no compearance for the defender, the Lord Ordinary ſhall appoint the ſummons to be again inrolled according to the date of its calling.

And

And if no compearance is made for the defender at the ſecond calling, decreet of certification may be pronounced immediately in abſence: but in ſuch caſe, the decreet muſt remain unextracted for the ſpace of four weeks at leaſt, after it is ſigned by the Lord Ordinary.

The production of extracts from the records of an inferior court, of the writings called for, in a ſingle reduction, is a relevant defence againſt certification; but when improbation is joined, the writing itſelf muſt be produced, unleſs it is recorded in the books of ſeſſion or of chancery; in which caſe, a condeſcendence of the date of the record ſhall ſtop certification. Stair's In. b. 4. tit. 20 § 21.

If the writings called for are recorded in the records of an inferior court, the Lord Ordinary will grant warrant for tranſmitting the principal writings to the proceſs.

If the defender ſhall appear, and produce the writings in queſtion, he muſt abide by the verity thereof under his hand; and if he do Ibid. § 19.

not, the ſame ſhall be held to be forged.

Upon production of the writings called for, after the defender has abidden by the verity thereof, the Lord Ordinary will make great aviſandum with the writs produced, and grant circumduction *quoad ultra*; after which he can proceed no further; and the cauſe muſt then be inrolled in the roll of ordinary actions for the inner houſe.

When there is no ſuſpicion of forgery or falſehood, the Lords, upon a petition, will grant warrant to the Lord Ordinary in the outer houſe, to diſcuſs the reaſons as in a ſimple reduction; and in ſuch caſes, the proof may be taken by two Ordinaries. But in all caſes of forgery and falſehood, the witneſſes and parties muſt be examined by the Lords in preſence, and the cauſe muſt be determined by the court.

If a forgery ſhall be proved, and the court ſhall be of opinion, that it merits a capital puniſhment, the Lords will remit the cauſe to the court

court of juſticiary; but if a leſſer puniſhment is intended, ſuch as baniſhment, pillory, or whipping, *&c.* the court itſelf will inflict it.

SECT. III.

Of Declarators of Rights of Property.

THIS proceſs is now carried on in the ſame manner as other ordinary actions, notwithſtanding the act of regulation 1672.

SECT. IV.

Of Proceſs of proving the Tenor.

THE preliminaries of this proceſs are the ſame as in an ordinary action; but though it is inrolled before the Lord Ordinary in the outer houſe, he cannot judge in it; he can only make great aviſandum to the Lords: after which, the proceſs muſt be

inrolled in the roll of ordinary actions for the inner houſe, where it is adviſed by the Lords in preſence.

In this proceſs, the relevancy is generally determined before pronouncing the act allowing a proof.

When the term allowed in the act for taking the proof is expired, the cauſe muſt be inrolled in the ordinary action roll for the inner houſe; and the court, upon the application of parties, will make aviſandum with the proof, and grant circumduction: after which, the form of proceeding is the ſame as in other concluded cauſes.

SECT. V.

Of Proceſs of Ceſſio bonorum.

THough this action is of the nature of a ſuſpenſion, and is claſſed as ſuch by Lord Stair; yet as it is properly an original action,

action, and is mentioned amongſt the actions for the inner houſe in the regulations 1672, it falls next in order to be treated of here.

The ſummons proceeds upon a recital, that the purſuer is in priſon, and unable to pay his debts; it is therefore neceſſary that the purſuer ſhall be in priſon at the time of raiſing the ſummons.

The occaſion and way how the purſuer came to be *lapſus bonis*, must be ſpecially libelled. A. S. 1ſt Dec. 1685

The ſummons in this proceſs muſt be called by the clerks in the outer houſe as an ordinary ſummons, and muſt alſo be inrolled in the ordinary action roll for the outer houſe; and a roll of the names of all the creditors called muſt be affixed on the wall of the outer houſe. Ibid.

After the dilators in this proceſs are diſcuſſed, great aviſandum ſhall be made to the Lords; and the proceſs ſhall then be inrolled in the ordinary action roll for the inner houſe. Act reg. 1672. § 5.

The

A. S. 8th Feb. 1688

The purſuer ſhall give in a diſpoſition of his eſtate real and perſonal, in favour of his creditors; and ſhall make oath in the following terms: "That he hath no "lands, heritages, ſums of money, goods or gear, belonging "to him, more than is contained "in the diſpoſition and inventory "produced in proceſs; and that "ſince his impriſonment, he hath "made no other diſpoſition than "that which is produced; and "that he has made no other diſpoſition before his impriſonment; and that ſince his impriſonment, he hath not put "out of his hands any money, "goods, or gear, belonging to

A. S. 18th July 1691.

"him; and that he has not cancelled, or put out of his hands, "any writs ſince his impriſonment."

If the purſuer ſhall acknowledge, that ſince his impriſonment he has cancelled or put away any writings out of his hands, he ſhall condeſcend on ſuch writings in his oath; and he ſhall alſo condeſcend

A. S. 8th Feb. 1688.

on

on any other diſpoſition he may have made of his eſtate real or perſonal; and if he ſhall deny the making of ſuch diſpoſition, and that his oath ſhall be redargued, the decreet of *bonorum* obtained by him ſhall be void and null, and he ſhall never get the benefit of a *Ceſſio bonorum* thereafter.

If it ſhall appear in the courſe of the proceſs, that the purſuer has been guilty of fraud, he ſhall not obtain decreet.

Bankrupts who obtain a decreet of *Ceſſio bonorum*, ſhall conſtantly wear a particular habit, which is preſcribed by the law. This is made an expreſs condition of the decreet; and in caſe the bankrupt ſhall be found at any time without the habit, his creditors may incarcerate him, and he ſhall forfeit all the privileges he is intitled to by the decreet.

Stair's In. l. 4. tit. 52 § 34.

A. S. 26th Feb. 1669 23d Jan. 1673.

18th July 1688.

This part of the form being extremely ſevere, the Lords, of late years, have generally diſpenſed with the habit in all caſes where they have found

found the bankrupt intitled to a decreet of *Ceſſio*.

SECT. VI.

Of Proceſs of Count and Reckoning.

THE preliminaries of this proceſs are carried on in the ſame form as other ordinary actions in the outer houſe; with this difference, that this proceſs ſhould be inrolled in the regulation-roll, though by the practice, it is often inrolled in the ordinary action roll.

A. S. 22d Nov. 1711 § 1.

At firſt calling before the Lord Ordinary, in caſe there is compearance for the defender, a day ſhall be aſſigned to him; before which, he ſhall give in to the clerk of the proceſs a charge againſt himſelf, of the whole ſubjects to be accounted for; with certification, in caſe of his failing to obey this order, he ſhall be holden as confeſſed upon the charge to be given in by the purſuer, provided

Ibid. § 2.

vided that the purſuer gives his oath of calumny upon ſuch charge.

The defender ſhall alſo give in with the charge, a copy of his diſcharge, with the vouchers in his poſſeſſion; and in the ſaid copy, ſhall condeſcend upon the articles inſtructed, and their vouchers, and ſhall alſo mark the articles not inſtructed. A. S. 22d Nov. 1711 § 3.

The accounts, both charge and diſcharge, ſhall be ſigned by the defender or his procurator; and if any part of the charge ſhall be found to be fraudulently omitted, or concealed, the defender ſhall be decerned in the double of what ſhall be found to have been ſo omitted; without prejudice to the other party to add to the charge: and after giving in the accounts, the defender ſhall not be heard upon any new article of diſcharge, unleſs it ſhall be made appear, that ſuch article had recently come to his knowledge; and in that caſe, if the defender ſhall be in fault, he ſhall pay a fine to the other party for his expence, occaſioned Ibid. § 2. 3.

ſioned by the delay, to be modified by the Lord Ordinary.

A. S. 22d Nov. 1711 § 4. When the Lord Ordinary aſſigns a day to the defender to give in his accounts, he ſhall at the ſame time name the Lord who in courſe is to be Ordinary to the next count and reckoning, to be auditor thereof.

Note. The Lords officiate by turns in proceſſes of count and reckoning, according to the order of their ſeats on the bench, beginning at the Lord who ſits upon the Lord Preſident's right hand.

Ibid. § 5. After the accounts and inſtructions are produced, the Ordinary is authoriſed to appoint one or more advocates, or other proper perſons of integrity, judgement, and experience, to conſider the accounts and vouchers, to ſtate the points in controverſy, and to prepare and adjuſt the minutes, for the Ordinary to give his interlocutor upon the whole. Theſe perſons are alſo impowered to call parties and clerks before them, and are ordered to ſign their report,

port, and to return the ſame to the clerk of the proceſs; where it is ordained to lie for eight days, to be ſeen by all concerned without fee or reward; after which, no objection ſhall be received againſt the facts as ſtated in the report, but upon payment of 20 s. Sterling, or a larger fine, as the Ordinary ſhall pleaſe to appoint. The Lord Ordinary may renew the remit if neceſſary; and the perſon to whom the remit is made, is intitled to be paid for his trouble as his Lordſhip ſhall direct.

This act is alſo extended to all proceſſes which do reſolve into a count and reckoning, though ſuch accounting is not libelled in the original ſummons.

Note, Theſe cauſes are now uſually remitted to accountants, who, by their profeſſion, are beſt qualified for ſuch employment.

It often happens, that by the anxiety of one party, and the repeated delays of the other, theſe remits are made before the accounts and vouchers are produced,

which renders them quite ineffectual. The ſtrict obſervation of the firſt part of this act of ſederunt would effectually remedy this evil.

By the practice at preſent, upon giving in the report, the Lord Ordinary, at a calling, ordains all parties to ſee and object to it, againſt a time certain; and if no objections are given in within the time limited, the cauſe is again inrolled, and his Lordſhip approves of the report, and pronounces an interlocutor in terms thereof: but if objections are given in, they are ordained to be anſwered; and the proceedings in the cauſe thereafter are the ſame as in ordinary actions.

SECT. VII.

Of Proceſs of Ranking and Sale of a bankrupt eſtate.

Ch. II. p. 3. ch. 17

THis proceſs proceeds upon an act of parliament in 1681, " whereby

" whereby the Lords of Seſſion
" are impowered, upon a proceſs
" at the inſtance of any creditor
" having a real right, to cognoſce
" and try the value of eſtates
" where the heritor is notoriouſly
" bankrupt, and the creditors in
" poſſeſſion of the eſtate, and to
" value the ſame according to the
" true worth thereof, in rents,
" caſualties, rights, and hold-
" ings, according to the uſe and
" cuſtom of the country where the
" lands lie; and to grant commiſ-
" ſion to perſons to ſell ſuch lands
" and eſtates, or any part thereof,
" at the ſaid rates, or more; with
" conſent of the debtor, where
" there is a legal reverſion compe-
" tent to him; and without his
" conſent, where there is no legal
" reverſion; and that the price
" which ſhall be got for the ſaid
" lands, ſhall be diſtributed by
" the commiſſioners appointed to
" ſell the lands, or by the pur-
" chaſer, amongſt the creditors,
" proportionally according to their
" ſeveral ſums, rights, and dili-

 " gences,

" gences, as they ſhall be ordered " and found preferable by the " Lords, whether the creditors " have compeared or not."

W. & M. p. 1. ſeſſ. 2 c. 20. This act was afterwards altered by an act in 1690; which declares, That the ſale may proceed ſo ſoon as it ſhall be found, that the debtor is bankrupt, and utterly inſolvent, whether the legal be expired or not; and that if no buyer be found at the rate determined by the Lords, it ſhall be lawful for them to divide the lands, and other rights, among the creditors, according to their ſeveral rights and diligences, and to determine the price and value of liferent-eſcheats affecting the lands.

The purſuer of this action muſt have a real right in the lands, and one of the creditors at leaſt muſt be in poſſeſſion thereof.

A. S. 23d Nov. 1711 § 1. The debtor, and all his real creditors, who are in the known actual poſſeſſion of his lands, by labouring, or uplifting rents, muſt be cited in the ordinary form of law; and the bankrupt's other creditors,

creditors, and all others having, or pretending to have, intereſt, muſt be cited by an edictal citation at the market-croſs of Edinburgh, pier and ſhore of Leith, upon ſixty and fifteen days for firſt and ſecond diets; which edictal citation muſt alſo be executed *to the ſame day*, at the pariſh-church doors where the lands lie, after divine ſervice, upon twenty-one and ſix days warning; and the execution of all theſe edictal citations muſt be recorded in a particular regiſter, kept by the clerks of ſeſſion for that purpoſe, before the laſt day of compearance, otherwiſe proceſs ſhall not be ſuſtained.

The ſummons muſt contain a warrant for citing the defenders in manner before mentioned.

Before the act of ſederunt 17th January 1756, it was neceſſary that a ſummons of ſale ſhould contain the particulars of all the heritable eſtate belonging to the bankrupt, and the omiſſion of any one of them was fatal to the action; but by that act it is

A.S. 17th Jan. 1756. § 12.

ordained, That every ſummons of ranking and ſale ſhall contain a general clauſe, mentioning all other lands and heritable eſtate belonging to the bankrupt, or to which he may ſucceed as heir to any of his predeceſſors; and that it ſhall be competent to the raiſer, and carrier on of ſuch proceſs of ranking and ſale, upon his diſcovering any heritable eſtate belonging to the bankrupt during the courſe of the ranking and ſale, to bring a proof of the rental and value of ſuch lands and other heritable eſtates ſo diſcovered, notwithſtanding they were not ſpecially libelled: providing always, That upon ſuch diſcovery, and before granting warrant for a proof of the rental and value of the newly diſcovered eſtate, application ſhall be made to the Lord Ordinary in the ranking, and he ſhall give directions to give notice of the eſtates being diſcovered to belong to the bankrupt, and that the ſame is to be ſold as part of the bankrupt's eſtate, by advertiſement in the Edinburgh Evening-

ning-Courant, weekly, for three weeks ſucceſſively; and upon ſuch notification's being reported to the Lord Ordinary in manner aforeſaid, he ſhall grant warrant for proving the rental and value of ſuch new diſcovered eſtate, in the ſame manner as if it had been particularly libelled in the original ſummons of ranking and ſale.

After the ſummons is called, ſeen, and returned, it muſt be inrolled in the regulation-roll. A. S. 23d Nov. 1711 §6.

Note, Though by the act of ſederunt 1711, as well as by the late act in 1756, ſummonſes of ranking and ſale ought to be inrolled in the regulation-roll, yet by the practice they are often inrolled in the ordinary action roll.

When a proceſs of ranking and ſale is called by courſe of the regulation-roll, the Lord Ordinary will pronounce an act in the ſale, for proving the rental and value of the bankrupt's eſtates; and will grant diligence for recovering the bankrupt's writings; and aſſign a day for the creditors to produce their Ibid. §6. A. S 17th Jan. 1756 §1.

their rights and intereſts; and, *at the ſame time*, he muſt name the Lord who, in the courſe of the book, is next in order to be Ordinary to the ranking.

Note, Proceſſes of ranking are appointed to go to the Lords by turns, according to the order obſerved in the proceſſes of count and reckoning.

A. S. 17th Jan. 1756. § 1. By the act of 1756, the order to the creditors to produce their rights, is directed to be made with certification, as in a reduction and improbation; and the Lord Ordinary is authoriſed to ordain the interlocutor, aſſigning the firſt term for production, to be inſerted in the Edinburgh Evening-Courant, once every week, for three weeks ſucceſſively, immediately after the date of the interlocutor; and during the running of the ſaid term, the Lord Ordinary may grant diligence againſt havers, upon application of any of the creditors.

Ibid. § 2. Upon the elapſe of the firſt term aſſigned for production, the proceſs

ceſs muſt be called before the Lord Ordinary to the ranking; when he will appoint a time and place for a meeting of the creditors who ſhall have produced their rights, for chuſing an agent for carrying on the proceſs; and the perſon choſen by the majority of ſuch creditors preſent at ſuch meeting, or who ſhall have lawfully authoriſed one to vote for them, ſhall be approved of, and authoriſed by the Lord Ordinary.

Where the yearly rent of the eſtate under ſale is L. 300 Sterling, or upwards, ſuch creditor only whoſe principal ſums, excluſive of intereſt and penalties, unleſs accumulated by adjudication, amount to L. 50, is intitled to vote in the election of the common agent; but where the yearly rent of the eſtate is under L. 300, the qualification to vote is extended to every creditor whoſe principal ſum amounts to L. 30 Sterling, excluſive of intereſt and penalties, as aforeſaid. A. S. 17th Jan. 1756. § 2.

The common agent, after his election, muſt immediately apply to the Lord Ordinary; and, upon ſuch Ibid. § 3.

ſuch application, his Lordſhip is directed by the ſaid act, to aſſign a ſecond term to the whole creditors of the bankrupt, to produce their claims againſt the bankrupt, or his eſtate, and the whole vouchers thereof; with certification, that ſuch writs as ſhall not be produced ſhall be held as falſe and forged, in ſo far as they may affect the bankrupt's eſtate, and the intereſt of the creditors therein, who have, or ſhall produce their rights and diligences affecting the ſame. The Lord Ordinary is alſo directed to order notice to be given to all parties concerned, in the ſame manner as is appointed for the firſt term: which notification being reported to the Lord Ordinary, a minute is ordered to be made thereon; which is held as ſufficient evidence of the notice againſt all parties concerned.

A. S. 17th Jan. 1756 § 6. It is alſo ordained by the ſaid act, that, at the ſame time that the firſt and ſecond terms are aſſigned for production, the Lord Ordinary ſhall aſſign a term for the creditors

tors to depone upon the verity of their reſpective debts; and ſhall grant commiſſion to the judge-ordinary, or to any of his Majeſty's juſtices of peace, for taking the reſpective creditors oaths, to be reported at the ſeveral diets appointed for production, in manner after written; with certification, that no creditor ſhall be ranked until he ſhall have made oath of the verity of his debt.

Upon elapſing of the ſecond term, the proceſs ſhall be called before the Lord Ordinary, who ſhall grant certification *contra non producta*, as in an improbation; but with this condition, that every production made within ten days after the date of the interlocutor, ſhall be received. A. S. 17th Jan. 1756 § 4.

After theſe ten days are expired, the common agent ſhall cauſe the decreet of certification to be extracted; and ſuch decreet ſhall have the ſame force and effect in favour of the whole creditors whoſe intereſts ſhall have been produced in the proceſs, Ibid. § 5.

ceſs, ſo far as concerns the eſtate under ſale, or price thereof, as if they had ſeverally brought a proceſs of reduction and improbation againſt the whole other creditors upon the bankrupt eſtate, and had thereupon obtained and extracted a decreet of certification; without prejudice to the creditors who ſhall have neglected to produce their intereſts, to claim the bankrupt's ſhare of the price, and to uſe diligence either againſt him or his other eſtate.

A. S. 17th Jan. 1756 § 7. The production in the ranking being cloſed, "the Lord Ordinary ſhall aſſign a day to the "common agent, to make up a "ſtate of the intereſts produced, "mentioning their rights and di"ligences, the ſums claimed by "the reſpective creditors, the or"der of their reſpective preferen"ces, with ſuch objections as oc"cur to him, either to the lega"lity, or to the juſtice of the ſe"veral claims, or to the extent of "their debts, or to their prefe"rences,

" rences, notwithſtanding the ap-
" parent priority of their ſecurity
" or diligence."

" After the ſtate of the claims A. S. 17th
" is made up, and reported to the Jan. 1756
" Lord Ordinary, his Lordſhip §8.
" ſhall aſſign a day to the com-
" mon debtor, and to the credi-
" tors producing as aforeſaid, to
" make ſuch other objections to
" the intereſts produced, as they
" ſhall think proper, and to lodge
" them in writing with the clerk
" of the proceſs againſt the day ſo
" aſſigned; with certification, that
" all objections that ſhall be omit-
" ted to be proponed, either by
" the common debtor, or by the
" common agent, or by the cre-
" ditors, againſt the day ſo aſſign-
" ed, ſhall be held to be paſſed from
" by all parties concerned; and it
" ſhall not be competent to them,
" or either of them, thereafter to
" propone the ſame in the courſe
" of the ranking, or in the divi-
" ſion of the price of the bank-
" rupt's eſtate, unleſs ſuch objec-

" tions ſhall ariſe from facts new-
" ly come to their knowledge."

A. S. 17th Jan. 1756 § 9. " The objections being given in
" to the proceſs in manner above
" directed, the Lord Ordinary
" ſhall aſſign a time to the credi-
" tors to whoſe claims the objec-
" tions have been made, for gi-
" ving in a full anſwer in writing
" to the objections made to their
" reſpective claims, and to lodge
" the ſame with the clerk; and
" upon their being ſo lodged, his
" Lordſhip ſhall appoint a further
" time to the objectors reſpective-
" ly to reply alſo in writing, and
" to lodge the ſame with the
" clerk."

Ibid. § 10. " After the objections, anſwers,
" and replies, have been given in
" as aforeſaid, the Lord Ordinary
" ſhall appoint a diet * for hear-
" ing parties thereon; and ſhall,
" with all convenient diligence,
" pronounce his interlocutor upon
" the ſaid objections, anſwers,
" and replies, except with reſpect

* Day.

" to

" to ſuch objections as his Lord-
" ſhip ſhall take to report."

No repreſentation ſhall be allowed againſt the Lord Ordinary's determination of the ſaid objections, but without prejudice to the parties to apply to the Lords by petition. A. S. 17th Jan. 1756 § 10.

The Lord Ordinary ſhall not make a report of any objections with which he has made aviſandum to the Lords, until the ſeveral objections determined by him ſhall be either acquieſced in by the parties, or ſtated to the Lords by petition; and that ſuch petition ſhall either have been refuſed, or ordained to be anſwered: And when the whole objections remaining undetermined ſhall be ſtated to the Lords, they ſhall appoint a particular diet for adviſing the whole together, without abiding the courſe of the rolls. Ibid. § 11.

If the purſuer ſhall die during the dependence, or ſhall forbear to inſiſt in the proceſs, or if his title and intereſt ſhall happen to be ſatisfied and extinguiſhed, the factor, if there ſhall be any ap- A. S. 23d Nov. 1715 § 4.

pointed by the court, or otherwiſe any other real creditor, may, upon *ſpecial warrant* from the Lords, carry on the proceſs for behoof of the whole creditors. And in order to obtain ſuch warrant, it is neceſſary to apply to the court by petition.

A. S. 23d Nov. 1711 § 5. If the debtor, or any of the creditor's defenders, compearing, and producing their intereſts, ſhall happen to die during the dependence of the proceſs, the Lord Ordinary will grant diligence for citing the apparent heir of the debtor, or of ſuch defender; and upon reporting the execution of ſuch diligence, the proceſs ſhall be proceeded in, without waiting the year of deliberation, or transferring the proceſs *paſſivè*.

Ibid. § 2. By this act, the factor appointed by the court upon the eſtate, is authoriſed to raiſe an adjudication in the name of the whole creditors, according to certain directions in the act; but as this is ſeldom practiſed, it is unneceſſary to recite the clauſes here.

The

The proceſs of ranking of the creditors muſt be concluded, and the decreet extracted, before the lands can be expoſed to ſale. Act reg. 1695. § 26.

After the ranking is finiſhed, and the proof of the rent and value of the eſtate under ſale is concluded, great aviſandum muſt be made with the proof. This is done by calling the act in the ſale; after which a ſtate muſt be prepared in the ſame manner as in other concluded cauſes, with the addition of a ſcheme of the yearly rent, and value of the eſtate, as proved, by way of an account.

If, upon adviſing the ſtate, the Lords ſhall find, that the amount of the debts in the ranking does exceed, or is nearly equal to the value of the eſtate as proved, the court will ordain the eſtate to be ſold, and letters of publication * to be iſſued, notifying the time of the roup, in the preciſe terms of the act of parliament 1681; which

* A letter of publication is a writ in the King's name, and under his ſignet, ſigned by a clerk of ſeſſion.

Ch. II. p. 3. c. 17 " ordains the ſale to be by a public " roup, not being under the rate " and price appointed by the Lords " of Seſſion; and that the roup " be made after public intimation " at the market-croſs of the head " borough of the ſhire where the " lands lie, and at the head bo- " rough of the bailiery, ſtewarty, " or regality, if they lie within " the ſame; and at the pariſh- " kirk * where the lands lie, and " at ſix other adjacent pariſh- " kirks, (to be named by the " Lords of Seſſion), at the diſſol- " ving of the congregation, on a " Sunday after the forenoon's ſer- " mon, by letters of intimation " under the ſignet, upon the " Lords deliverance; which let- " ters ſhall ſpecially expreſs the " time and place of the roup; and " that the creditors having real " rights and poſſeſſion, ſhall be " ſpecially cited upon twenty-one " days, and all other perſons con- " cerned, whether within or with-

* Church.

" out

" out the kingdom, at the mar-
" ket-croſs of the head borough of
" the ſhire, ſtewarty, or regality,
" where the lands lie, and at the
" market-croſs of Edinburgh, and
" pier and ſhore of Leith, upon
" ſixty days; and that a copy of
" the ſaid intimation ſhall be af-
" fixed at all the places aforeſaid,
" expreſſing the lands to be roup-
" ed, the price appointed by the
" Lords of Seſſion, and the time
" and place of the roup."

Regalities being now aboliſhed, executions of the letters of publication muſt be made at the market-croſs of the head-borough of the ſhire or ſtewarty within which the lands lie. A. S. 29th Feb. 1752

Upon the day aſſigned by the letters of publication, the eſtate is put up to roup before the Lord Ordinary on the bills, according to articles of roup made out by the clerk, and ſigned by his Lordſhip; one of which is, That the purchaſers ſhall find caution for the price.

If

If no purchaſer ſhall appear to offer at the roup, or if, upon ſpecial reaſons ſuggeſted to the Lord Ordinary, it ſhall appear to him, that a delay of the ſale may be beneficial to all parties concerned, the roup may be adjourned to a day certain by an interlocutor ſigned by the Lord Ordinary, and ſuch adjournment muſt be publiſhed in the Edinburgh news-papers.

If more offerers than one ſhall appear at the roup, the higheſt offerer ſhall be preferred; and upon report of the ſale by the Lord Ordinary to the Lords, the court will pronounce a decreet of ſale, and adjudge the eſtate to belong to the purchaſer, upon payment of the price; and remit to the Lord Ordinary in the ſale to order a ſcheme of diviſion to be made of the price.

The ſcheme of diviſion being made out by an accountant, in conſequence of a remit from the Lord Ordinary, his Lordſhip will ordain

ordain all parties having intereſt to ſee and object; and after it has remained a competent time in the clerk's hands, if no objection ſhall be offered to it, the ſcheme will be approved of by the Lord Ordinary, who at the ſame time will pronounce a decreet of diviſion, and warrant for the purchaſer to pay the price.

If any perſon lawfully ſummoned, either in common form or edictally, ſhall ſuffer the decreet of ranking to go out without producing and competing upon his intereſt, the decreet and ſale ſhall ſtand good notwithſtanding, and the purchaſer ſhall be bound to pay accordingly; and the perſon failing ſhall have no other remedy, but to purſue the receivers of the price, and their heirs, for repetition. W. & M. p. 1695. c. 6. A. S. 23d Nov. 1711 § 8.

It is uſual for the court, upon a petition of the agent in the ſale, to grant warrant to the factor to advance money out of the rents, for carrying on the proceſs, to the agent, upon his receipt and obligation

obligation to be accountable. And the agent's account is uſually cleared by the Lord who is appointed Ordinary, to adjuſt the ſcheme of diviſion of the price.

A. S. 23d Nov. 1711 § 9. Before 1754, the expence of proceſſes of ſale and ranking was paid by the creditors, in proportion to their reſpective dividends of the price; but now the expence is ordered to be paid out of the price, and only the reſidue thereof to be divided among the creditors.

A. S. 10th Aug. 1754

W. & M. p. 1695. c. 6. After the elapſe of one year from the decreet of ſale, the purchaſer may, by warrant of the court, conſign the price into the hands of the town of Edinburgh, at 3 *per cent.* intereſt; and ſuch conſignation ſhall be a ſufficient diſcharge to him for the price.

A. S. 11th Mar. 1767 Proceſſes of ſale which have not been prepared, inrolled, and put up on the wall, at leaſt ten ſederunt-days before the end of the ſeſſion, ſhall not be adviſed in that ſeſſion.

SECT.

SECT. VIII.

Proceſs of Ranking and Sale at the inſtance of an apparent heir.

THis proceſs is founded upon an act of parliament in 1695, and is carried on in the ſame manner as the proceſs of ſale in the caſe of bankruptcy, with the two following exceptions. W. & M. P. 1695. c. 24.

1. The eſtate may be ſold, although there be no bankruptcy.

2. The ſale may proceed before the ranking is completed.

SECT. IX.

Proceſs of Removing.

THE form of proceedings in this proceſs, is the ſame as in an ordinary action; with this difference, that it is intitled to ſummary diſpatch, without abiding the courſe of any roll. A. S. 14th Dec. 1756 § 7.

2dly,

A. S. 14th Dec. 1756 § 6.

2*dly*, In caſe the proceſs is commenced before an inferior court, and the defender ſhall offer a bill of advocation, he ſhall, within ten days after the bill is paſſed, find caution for implement of what ſhall be decerned, as in a ſuſpenſion.

SECT. X.

Proceſs of Multiple-poinding.

A. S. 1ſt Feb. 1677

THis proceſs may be repeated *incidenter* in a proceſs of forthcoming, without a new inrolment. In all other things, the proceedings are the ſame as in ordinary actions.

SECT.

SECT. XI.

Declarator of Diviſion of Commonty.

THough the proceedings in this proceſs, and in that of the diviſion of run-ridge lands, is very near the ſame as in other ordinary actions; yet as great accuracy and exactneſs is required in carrying them on, it may not be improper to give a particular account of them here.

The firſt of theſe proceſſes is founded upon an act of parliament in 1695; which ſtatutes and ordains, That all commonties, excepting commonties which belong to the King in property, or to royal boroughs in burgage, may be divided at the inſtance of any having intereſt, by ſummons raiſed, againſt all perſons concerned, before the Lords of Seſſion; who are by the ſaid act impowered to diſcuſs the relevancy, and to determine upon the rights and inte- W. p. 1. 1695. ch. 38.

reſts of all parties concerned; and to value and divide the ſame, according to the value of the rights and intereſts of the ſeveral parties concerned; and to grant commiſſions to ſheriffs, ſtewarts, bailies of regalities, and their deputies, juſtices of peace, or others, for perambulating and taking all other neceſſary probation; which commiſſion ſhall be reported to the Lords, and the proceſs ſhall be ultimately determined by them.

By this act, the Lords of Seſſion are alſo impowered, either to divide moſſes which happen to be in the ſaid commonties; or if ſuch moſſes cannot be conveniently divided, to declare that they ſhall remain common, with free iſh and entry * thereto, whether divided or not.

The intereſt of the heritors having right in the common, is ordered by the ſaid act to be eſtimated according to the valuation of their reſpective lands or properties;

* i. e. egreſs and ingreſs.

and

and the ſhare to be allotted to each heritor is appointed to be made next adjacent to his property.

The preliminaries of this proceſs are carried on in the ſame manner as in ordinary actions in the outer houſe.

The common exceptions to this proceſs are, either to the purſuer's title, or to the competency of the action, in caſe the commonty falls under the exception in the act of parliament.

When the action is ſuſtained by the Lord Ordinary, the form of the interlocutor is as follows.

" Finds the purſuer intitled to " carry on the action; and finds " the libel of diviſion relevant; " and grants commiſſion to " to viſit and peram- " bulate, and to take cogniſance " of the ſeveral limits and march- " es of the commonty or muir " libelled; and to take all neceſſa- " ry probation thereanent *, by " the oaths of ſuch habile witneſ-

* i. e. Concerning it.

" ſes as ſhall be adduced by the
" parties for aſcertaining the li-
" mits and extent of the ſaid com-
" monty, and the poſſeſſion of the
" reſpective parties therein, and
" extent and endurance of ſuch
" poſſeſſions, and of any interrup-
" tions that may have been made
" by the parties to one another's
" poſſeſſions, and for what rooms *
" or lands ſuch poſſeſſions have
" been had; and ordains extracts
" of the valuation of the lands †
" ſo poſſeſſed, to be produced be-
" fore the commiſſioners; and
" likewiſe to take trial and cogni-
" tion, by the oaths of ſuch wit-
" neſſes as ſhall be adduced by the
" parties, of the different qualities
" of the ground; and to cauſe
" meaſure the ſaid whole com-
" monty, and every parcel there-
" of, as the ſame ſhall be diſtin-
" guiſhed by its different quali-
" ties; and, for that end, to call
" to their aſſiſtance perſons ſkilled

* Farms. † Authentic certificates of the value of the lands, as rated in the books for the land-tax.

" in

" in meaſuring ground, and to
" cauſe them, upon oath, make
" out a ſcheme or map of the ſaid
" whole commonty in its quanti-
" ty, and of every parcel thereof,
" as it ſhall be diſtinguiſhed by its
" different qualities; and thereaf-
" ter to proceed to divide the ſaid
" ground among the parties ha-
" ving intereſt therein, and that
" according to the valued rents of
" the ſeveral lands *, as part and
" pertinents whereof they poſſeſs
" the commonty; and that in the
" appointment of their ſhares,
" each heritor's † part ſhall be
" ſet off to him, ſo as it may be
" eweſt ‡ and moſt convenient to
" his property-lands; and to put
" and ſet march-ſtones for divi-
" ding each heritor's proportion
" from the other; as alſo to di-
" vide, in the ſame manner, the
" moſſes, if any be, lying within
" the ſaid common muir, among
" the ſaid heritors; but in caſe it

* Rents at which the lands are rated in the books kept for the land-tax.

† Landholder. ‡ Neareſt.

" ſhall be inſtructed to the com-
" miſſioners, that the ſaid moſſes
" cannot be conveniently divided,
" to cauſe leave the ſame ſtill com-
" mon, with free iſh and entry
" thereto; and that upon the
" ground of the ſaid commonty,
" or any place in the neighbour-
" hood thereof, as ſhall appear
" moſt convenient to the commiſ-
" ſioners, any of the lawful day
" or days of the month of
" or to the day
" thereof next to come, and aſſigns
" the ſaid day of
" next to come, for report-
" ing the ſame; and grants
" diligence at the inſtance of all
" parties, purſuers and defenders,
" for citing witneſſes to compear
" before the commiſſioners to the
" effect foreſaid; and ordain the
" commiſſioners in the diviſion to
" have a due regard to the hou-
" ſes and property-lands of the
" ſeveral parties having intereſt:
" and in order that no party in-
" titled to a ſhare in the ſaid divi-
" ſion may be excluded therefrom,
" authoriſe the clerk to receive

" ſuch

" ſuch intereſts * as may be pro-
" duced before extract; as alſo
" appoints the commiſſioners to
" receive ſuch intereſts as ſhall be
" produced before them, though
" not produced in the extract;
" and to admit the parties ſo pro-
" ducing to a ſhare in the ſaid
" diviſion, according to their ſe-
" veral rights, intereſts, and poſ-
" ſeſſions, in the ſame manner as
" is above deſcribed."

When this commiſſion is reported, the act may be called, and great aviſandum may be made with the proof and diviſion; after which a ſtate muſt be prepared. The form of proceeding afterwards is the ſame as in other concluded cauſes.

When diſputes ariſe between the parties in the courſe of the execution of the commiſſion, the commiſſioner commonly delays making the diviſion until the report of the proof be adviſed by the court.

* The title-deeds and vouchers of the ſeveral rights of the perſons claiming.

Proceſs

Proceſs of Diviſion of Runridge-lands.

W. p. 1695 c 23

Lands lying in runridge may alſo be divided; but this proceſs is appointed to be carried on before the ſheriffs, ſtewarts, or juſtices of peace of the ſeveral ſhires where the lands lie; and the form of proceeding is the ſame as in that of the diviſion of commonty.

By this act, the judges are directed to have ſpecial regard to the manſion-houſes of the reſpective heritors, and to adjudge to them in the diviſion, ſuch parts as ſhall be moſt commodious to their reſpective manſion-houſes and policy.

Borough and incorporate acres are excepted from this act.

Though the act impowers juſtices of peace to judge of diviſions of runridge-lands, parties ſeldom or never bring ſuch actions before them, unleſs when the ſubject to be divided is of very little value.

SECT.

SECT. XII.

Proceſs by Petition and Summary Complaint.

THis ſection conſiſts of two branches.

1. Petition for ſequeſtration;
2. Petition and complaint.

§ 1. *Petition for Sequeſtration.*

In caſes of bankruptcy, or competition of creditors, to prevent any loſs that may happen to parties during the litigation, the Lords may ſequeſter the eſtate, and appoint a factor for managing thereof. This is done upon a petition to the court, at the ſuit of any of the parties concerned, which muſt be intimated according to the forms preſcribed in incidental petitions.

The act of ſequeſtration is pronounced by the Lords in preſence; but they uſually remit to the Lord Ordinary A. S. 22d Nov. 1711 § 10.

Ordinary in the cauſe to name the factor; who muſt find caution to account for his intromiſſions, and alſo to obey the rules and inſtructions appointed by the Lords.

Order of court, 17th July 1764. Petitions for ſequeſtrations ſhall not be received after the 25th of July for the ſummer-ſeſſion, and the 20th of February for the winter-ſeſſion. *Vide* Petitions, above, ch. 3. ſect. 2.

Upon the factor's finding caution, an act of factory muſt be extracted.

A. S. 22d Nov. 1711 § 6. The factor ſhall, within ſix months after the extracting of his factory, make up a rental * of the eſtate, and a liſt of the arrears of rents, to be reported to the Lords, and lodged in the hands of the clerk of the proceſs, there to remain, and to be made forthcoming to all parties having intereſt.

Ibid. § 7. When any alteration happens in the rental, ſuch alteration ſhall, within three months, be reported

* Rent-roll.

to

to the Lords, and ſhall be put into the clerk's hands.

If any part of the rental, or charge, ſhall be omitted, or concealed, the factor ſhall be liable for the double of what is ſo omitted. A. S. 22d Nov. 1711 § 8.

The factor ſhall, once every year, give in a ſcheme of his account, charge and diſcharge, to the clerk of the proceſs, under the penalty of a fine, to be modified by the Lord Ordinary, not under half a year's ſalary, and alſo of being liable to be removed. Ibid.

Factors have one year after the term of payment allowed to them for the recovery of rents or debts; after which they are liable to pay intereſt for the money received. A. S. 31ſt July 1690.

The like regulations are made with reſpect to factors on the eſtates of pupils not having tutors, and all other factors named by the court, (excepting where it is otherwiſe provided by former acts), with additional directions for making inventories of the effects and debts, and for confirming debts A.S. 13th Feb. 1730.

and

and moveables in the name of the factors when neceſſary.

A. S. 13th Feb. 1730. § 8. The factor, in theſe laſt caſes, is alſo impowered to grant tacks, to continue during the time the eſtate ſhall be under ſequeſtration, and for one year longer; but factors on bankrupt eſtates are ſeldom authoriſed to grant tacks for more than three years certain.

Ibid. § 11. The cautioners for factors ſhall be bound with the factor, jointly and ſeverally, that the factors ſhall obey the rules laid down in this act.

§ 2. *Proceſs by Petition and Complaint.*

Summary complaints are competent againſt members of the court, for malverſation in their office, and alſo againſt parties in proceſſes, for any wrong done relative to the proceſs in dependence: and in ſome caſes, ſuch 10th G. II. c. 28. §6. complaints are authoriſed by act of parliament, ſuch as complaints for penalties incurred by acting plays;

plays; which muſt be lodged within ſix months after ſuch offence.

2. Complaints for penalties impoſed for wrongs done in the election and returning of members of parliament, which are ordered to be proceeded in ſummarily, upon thirty days notice to the perſon complained of, without abiding the courſe of any roll. 16th G. II. c. 11. § 17. 24. 30. 31. & 43.

Though the intention of parliament, in allowing theſe actions to be brought by way of ſummary complaint, ſeems to have been for quick diſpatch, and to ſave expence; yet neither of theſe ends have been obtained by it. A ſummons in the common form would have anſwered the purpoſe much better, provided ſuch ſummons had been ordered to be inrolled in the ſummary roll in the inner houſe, without being called in the outer houſe; as was practiſed in the caſe of the actions of valuation at the inſtance of his Majeſty's Advocate, againſt the claimants on the forfeited eſtates. This will appear evident, if the circumſtan-

ces of the two different forms are attended to.

An ordinary ſummons may be iſſued and executed in time of vacance; by which means, if it contains only one diet, it may be proceeded in upon the firſt day of the ſeſſion; whereas a petition and complaint muſt be moved in court, before a warrant can be granted for ſerving it upon the defender, whereby thirty days of the ſeſſion at leaſt muſt neceſſarily be gone, before any proceeding can be had upon it. The time allowed to the defender to put in his anſwer to a complaint, is alſo much longer than that of an ordinary ſummons on one diet; and the expence of a petition and complaint is much greater.

PART

PART II.

Proceſs originally commenced in an inferior court, and from thence removed to the court of ſeſſion by advocation or ſuſpenſion.

CHAP. I.

Preliminaries of Proceſs.

PROCESSES before inferior courts may be removed from thence to the court of ſeſſion, either, during the dependence of the action, by *advocation*; or, after ſentence is pronounced, by *ſuſpenſion*.

Advocation and ſuſpenſion are writs iſſued in the King's name, and under his ſignet, and ſigned by a clerk to the ſignet.

Both theſe writs proceed upon a warrant ſigned by one or more

of the judges *cauſa cognita*, upon a bill of complaint preferred in name of the party who thinks himſelf injured, and ſigned by a clerk to the ſignet, ſetting forth the reaſons why the cauſe ſhould be either advocated or ſuſpended.

A. S. 9th Feb. 1675 All bills, either of advocation or ſuſpenſion, muſt be preſented by the clerk of the bills, or his ſervant; who is directed to keep a roll of all ſuch bills, according to the order of time in which they are preſented, and a minute-book, both of paſſed and refuſed bills, by the alphabetic order of the parties ſurnames, which he is to make patent to every charger *gratis* when deſired.

A S. 9th Nov. 1680

A. S. 9th Feb. 1675 The Lords, by turns, attend the adviſing of bills for a week, *viz.* from Tueſday to Tueſday; and all bills are adviſed by the Lord Ordinary in the firſt inſtance.

The uſual time of attendance is from nine to ten in the morning in time of ſeſſion, and from eleven

eleven to twelve on Tueſdays and Thurſdays in the vacation.

Bills preſented in time of ſeſſion muſt remain before the Lord Ordinary, to whom they are firſt preſented, until they ſhall be adviſed: but bills preſented in time of vacance, and not adviſed within the week, ſhall be adviſed by the next week's Ordinary. A. S. 11th Nov. 1691.

SECT. I.

Of Bills of Advocation.

THere are ſome proceſſes which can neither be brought before the court in the firſt inſtance, nor removed from the inferior court by advocation, though the Lords may give directions to the judge in what manner to proceed; ſuch as,

1. Proceſſes for ſums not exceeding L. 12 Sterling, excepting upon the head of incompetency. 20th G. II. c. 43. §38.

This ſum was formerly limited to Ch. II. p. 1. ſeſſ. 3. c. 9.

Act reg. 1672. § 17 to 200 merks Scots, or L. 11, 2 s. 2/3 d. Sterling.

W. p. 1696. c. 31. 2. Proceſs for profanity and immorality.

W. p. 1695. c. 27. 3. Proceſs for miniſters ſtipends.

In this action, ſiſts of proceſs, as well as advocations, are diſcharged by the ſtatute.

Ch. II. p. 1. ſeſſ. 3 c. 9. 4. Proceſs expreſsly appointed by ſtatute to be judged by inferior courts; ſuch as,

(1.) Proceſs maritime, both before the judge of the high court of admiralty, and inferior judge-admirals.

J. VI. p. 1609. c. 6. (2.) Proceſs of divorce, before the commiſſaries of Edinburgh.

Ch. II. p. 1681. c. 16. Advocations from the high court of admiralty are diſcharged by ſtatute; and it has been often found by the Lords, that it is not competent for them, upon a bill of advocation, to give inſtructions to the judge of that court as to his manner of proceeding.

But advocations from the commiſſaries are expreſsly allowed by the ſtatute 1609, though by the ſame

ſame act, the commiſſaries of Edinburgh are declared to be the ſole judges in matters of divorce; and therefore the Lords, upon adviſing bills of advocation of ſuch proceſſes, generally remit the cauſe to the commiſſaries, with inſtructions in what manner they are to proceed.

Bills of advocation of a proceſs of removing, cannot be paſſed by one Lord, though they may be refuſed by him. If ſuch bills are preſented in time of ſeſſion, before they are paſſed they muſt be reported to the court; and if preſented in time of vacance, they muſt be adviſed by three Lords met together. A. S. 14th Dec. 1756 §6.

Reaſons of Advocations are,

1. Incompetency of the inferior court before which the action is brought.

2. Perſonal exceptions to the judge.

3. Contingency of the proceſs to be advocated with another proceſs

ceſs depending before the court of ſeſſion.

4. A wrong done by the judge. Members of the college of juſtice are not amenable in civil actions before any inferior judge; they may therefore advocate all proceſſes brought againſt them, of whatever extent, without aſſigning any other reaſon than that of their privilege.

Mary par. 1555. c. 39. Act reg. 1672. § 16

This privilege does not extend to caſes where the inferior judge acts under the expreſs authority of a particular act of parliament.

SECT. II.

Of Bills of Suſpenſion.

THE form of paſſing bills of ſuſpenſion is the ſame as of bills of advocation; with theſe exceptions: 1. In ſuſpenſions caution muſt either be offered, or the ſum charged for muſt be conſigned; whereas in advocations, caution is not required, excepting in the caſe of

A. S. 14th Dec. 1756 § 6.

of removings, where the advocator is obliged to find caution, as in ſuſpenſions, within ten days after paſſing the bill.

2. Bills of ſuſpenſion containing charge to ſet at liberty, muſt be intimated to the creditor perſonally, or at his dwelling-place, by a notary, and witneſſes, if within Scotland, before the bill ſhall be preſented. This intimation muſt be inſtructed by an inſtrument under the notary's hand; and the bill muſt be preſented within a week after ſuch intimation. A.S. 21ſt July 1675.

In ſome caſes, ſuſpenſions are not competent; ſuch as,

1. Suſpenſions of decreets-arbitral upon ſubſcribed ſubmiſſions, which are declared by ſtatute not to be reducible, excepting upon account of corruption, bribery, or falſehood, alledged againſt the arbiters.

Though ſuſpenſions do not fall under the words of this ſtatute, they are held to be comprehended under it, the inductive reaſon of the Act reg. 1695. § 25.

the ſtatute being the ſame with reſpect to both. *Vide* Proceſs of Reduction, Part 1. chap. 4. § 1.

Act reg. 1672. §19

2. By the act of regulations 1672, it is enacted, "That decreets *in foro contradictorio*, before the Lords of Seſſion, ſhall not be ſuſpended upon reaſons competent to have been proponed, or which were repelled in the former decreet." But if any matters of fact of importance to the cauſe, which were not known to the party when the decreet was pronounced, ſhall be afterwards diſcovered by him, the Lords will admit of a ſuſpenſion upon that ground.

By this act, decreets are held to be *in foro* when defences have been proponed, although the advocate for the defender ſhall afterwards have withdrawn his appearance.

Ibid.

Second and poſterior proteſtations are ordered by this act to be booked as decreets *in foro*; and the clerk of the bills is ordered, upon his peril, not to write on bills of ſuſpenſion

penſion of any decreet of the Lords *in foro*, until the bill ſhall be preſented to the Lords in preſence in time of ſeſſion, or three Lords met together in time of vacance.

The following bills cannot be paſſed by a ſingle Ordinary, but muſt be reported to the court, if preſented in time of ſeſſion; and if preſented in time of vacation, ſuch bills muſt be adviſed by three Lords met together, though one Lord may either refuſe the bill or grant a fiſt.

1. Bill of ſuſpenſion of a proceſs of removing. A. S. 14th Dec. 1756

2. Bill of ſuſpenſion, containing a charge to ſet at liberty. A. S. 21ſt July 1675.

3. Bill of ſuſpenſion of a ſentence of the court of ſeſſion *in foro contradictorio*, or of a decreet obtained in the ſaid court, after diſcuſſing a former ſupenſion, for liquid ſums, or deeds preſently preſtable. A. S. 29th Jan. 1650. Act reg. 1672. § 19

4. A ſecond bill of ſuſpenſion in the ſame cauſe, when a former has been refuſed. A. S. 9th Feb. 1675 A. S. 9th Nov. 1680

5. Bill

Act reg. 1672. §19

5. Bill of ſuſpenſion of a ſecond proteſtation.

Ch. II. p. 1681. c. 16.

6. Bill of ſuſpenſion of a decreet of the judge of the high court of admiralty.

7. Bills of ſuſpenſion on juratory caution.

A. S. 6th Dec. 1677

8. Bills of ſuſpenſion for his Majeſty's exciſe, which ſhall not be paſſed, excepting in preſence of all the Lords.

A. S. 10th July 1677. Act reg. 1672. §19

In order that it may appear what number of bills of ſuſpenſion have been offered of the ſame charge, the clerk of the bills is ordered to mark the number on the deliverance of the bill.

The following bills of ſuſpenſion are diſcharged, unleſs upon payment or conſignation.

W. p. 1696. c. 31.

1. Decreets for profanity and immorality.

W. p. 1695. c. 27.

2. Decreets at the inſtance of a miniſter for payment of his ſtipend.

W. p. 1696. c. 14.

3. Decreets for payment of ſtipends to univerſities and hoſpitals.

4. Decreets

4. Decreets for payment of ſalaries of parochial ſchoolmaſters. W. p. 1696. c. 26.

5. Bills of ſuſpenſion on a firſt proteſtation. In this caſe the ſuſpender muſt conſign L. 30 Scots. Act reg. 1672. § 19

6. Bills of ſuſpenſion of charges on notes of the royal bank of Scotland, and other banking companies.

Theſe laſt cannot be ſuſpended but upon offer of payment. 5th G. III.

7. Bills of ſuſpenſion of decreets of forthcoming. A. S. 1ſt Feb. 1677

8. Bills of ſuſpenſion upon account of double poinding, when there is no other reaſon in the bill. A. S. 16th Jan. 1650

Suſpenſion ſhall not be paſſed upon account of arreſtments, unleſs upon double poinding. A. S. 1ſt Feb. 1677

By the practice, the ſummons of multiplepoinding muſt be executed before preſenting the bill of ſuſpenſion.

By an act in 1650, the clerk of the bills was ordered to preſent no bill of ſuſpenſion of a charge for a liquid ſum, unleſs at the ſame time the ground of the A. S. 16th Jan. 1650

charge is alſo produced: and where the ground of the charge is a decreet of an inferior court, the ſuſpender is ordered either to produce an extract of the decreet, or an inſtrument, bearing, that the clerk had refuſed ſuch extract, excepting in the caſe of conſignation.

This rule was intended to prevent vexatious ſuſpenſions; but it being attended with a very great expence to the ſuſpender, the act fell into diſuſe. If, when the allegations in a bill are found relevant by the Lord Ordinary, it were ordered to be intimated to the charger perſonally, or at his dwelling-place if in Scotland, tho', when he is not in Scotland, the ſuſpender were obliged to produce the grounds of the charge, in terms of the act 1650, the expence of extracts would, in moſt caſes, be ſaved to the ſuſpender, and, at the ſame time, chargers would have an opportunity to ſhew cauſe why ſuch bills ſhould not be paſſed.

The

The Lord Ordinary, upon reading the bill, generally ordains it to be anſwered; but if the matter appear clear, he may refuſe it without an anſwer.

After the bill is paſſed, upon a new application of the party before the letters have paſſed the ſignet, the Lord Ordinary may reconſider it, and ſtop execution for ſome time, not exceeding a month from the time of preſenting the bill. A. S. 9th Feb. 1675

Siſts of execution upon bills of ſuſpenſion having been often granted indefinitely, without mentioning any time, became very inconvenient; and therefore an act was made in 1677, by which it is declared, that no ſiſt ſhall endure longer than a fortnight; and that when a bill is paſſed, ſuch ſiſt may be renewed, provided the ſame ſhall not exceed a month after the date of paſſing the bill; and that in caſe the ſuſpender ſhall not find caution, and expede his ſuſpenſion within that time, the A. S. 3d July 1677

charger ſhall be at liberty to put his diligence in execution.

If an anſwer to a bill is put in to court, execution ſhall be ſiſted until the bill ſhall be adviſed.

A. S. 29th Feb. 1688 When the reaſons of ſuſpenſion are offered to be proved by the charger's oath, if the reaſons are relevant, the Lord Ordinary is authoriſed to take the charger's oath when preſent; and in his abſence, his Lordſhip is directed to take the ſuſpender's oath of calumny, that he has juſt reaſon to propone ſuch ground of ſuſpenſion; and if he ſhall depone *affirmativè*, or if he ſhall not be preſent to give his oath, in either of theſe caſes the Lord Ordinary is directed to paſs the bill, with this quality, "That the ſuſpender ſhall "be liable to the charges and ex- "pences the charger ſhall be at "through the purchaſing of that "ſuſpenſion, and in diſcuſſing of "the ſame, according as he ſhall "depone upon theſe expences, "without any *modification* thereof,

"if

" if the letters ſhall be found or-
" derly proceeded."

SECT. III.

Of Bills of Advocation and Suſpenſion.

BY an act in 1712, it is provi- A.S. 20th Nov. 1712 § 2.
ded, " That where a reaſon of
" ſuſpenſion or advocation is of-
" fered to be proven by the con-
" trary party's oath, and the ſaid
" party is abſent, ſo that his oath
" cannot be got, the bill, in ſo
" far as concerns that reaſon, is
" to be refuſed, unleſs the ſuſ-
" pender, or raiſer of the advoca-
" tion, do give his oath of calum-
" ny thereupon, in caſe he be pre-
" ſent; and if abſent, that ſome
" document be produced under
" his hand, for inſtructing, that
" the reaſon is not inſert in the
" bill by the drawer without a
" warrant; which document, and
" other vouchers preſented with
" the bill, ſhall be kept by the

" clerk of the bills, unleſs deliver-
" ed up by him to the party upon
" inventar and receipt; and at or
" before diſcuſſing, the ſame, or
" the inventar and receipt, ſhall
" be tranſmitted to the clerk of
" the proceſs, to the effect, that if
" the reaſons are calumnious, or
" the vouchers be diſproven, the
" ſuſpender, or raiſer of the ad-
" vocation, may be decerned in
" expences."

A. S. 20th Nov. 1711 § 1. By this act, the Lord Ordinary is authoriſed to paſs bills of ſuſpenſion in part, and to refuſe them as to the remainder, as he ſhall think proper.

A. S. 6th Dec. 1718 The Lord Ordinary on the bills, either in time of ſeſſion or vacance, may grant commiſſion to take the oath of an abſent party, on any relevant point relating to the paſſing or refuſing of a bill of advocation or ſuſpenſion; and may grant a ſiſt in the mean time, not exceeding a month when the commiſſion is granted by one Ordinary, and not exceeding two months

months if granted or prorogated by three Ordinaries.

If the Lord Ordinary ſhall either paſs or refuſe a bill of advocation or ſuſpenſion, it is competent to either party to apply to the court by petition for redreſs, provided it be done before the letters paſs the ſignet.

The ſuſpender, in all caſes, muſt either conſign the ſum charged for, or find caution for implement of the charge, and for payment of ſuch ſums as the Lords ſhall modify for expence. A. S. 27th Dec. 1709

This conſignation muſt be in the hands of the clerk of the bills; but conſignations made in the courſe of a depending proceſs, muſt be in the hands of one of the principal clerks of ſeſſion. Order of Court, 16th Nov. 1738.

The act of ſederunt in 1709 provides, That cautioners ſhal' be liable for what ſhall be decerned againſt the ſuſpender, though the decreet charged on ſhall be turned to a libel; and that atteſtors of cautioners ſhall be bound as cautioners, A. S. 27th Dec. 1709

tioners, and ſhall be *ſubſidiariè* liable in their order.

Bonds of cautionry in ſuſpen-
A. S. 29th Jan. 1650. ſions muſt contain a clauſe, obliging the cautioner, his heirs and executors, for payment of the ſums, or doing the deeds, for which he is become cautioner in the ſuſpenſion, in the ſame manner as the ſuſpender is bound; and ſuch bonds muſt alſo be conceived alternatively, to pay or to perform
A. S. 23d Nov. 1717 to the charger, or to ſuch unto whom payment or performance ſhall be decerned to be made, by the decreet to follow on the ſuſpenſion.

A. S. 18th Feb. 1686 "The clerks of the bills ſhall "be liable to the party's damage, "as well where he refuſes a cau- "tioner who is ſufficient, or is "holden and repute to be ſuffi- "cient, as where he receives an "inſufficient cautioner."

A. S. 29th Jan. 1650 To prevent impoſition by production of forged diſcharges, or other writings, for verifying reaſons of ſuſpenſion, ſuch writings are ordered to be kept by the clerk,

clerk, or marked by him, and redelivered upon receipt for production when required; and by another act, the Lord Ordinary is ordered to mark the writings. A. S. 11th Nov. 1691

Both theſe acts are out of uſe, ſo far as concerns the order to mark the writings.

If the ſuſpender ſhall not be able to find caution, he may pray to have ſuſpenſion upon juratory caution. In ſuch caſe, the bill ſhall bear, that he only offers juratory caution; and he ſhall, before the bill is paſſed, give in a diſpoſition of all his eſtate real and perſonal, upon oath, in favour of the charger, as in a *Ceſſio bonorum*. This is called *juratory caution*. A. S. 8th Nov. 1682

In this caſe, the ſuſpender ſhall not have the benefit of a commiſſion, but ſhall depone in preſence of the Lord Ordinary. Ibid.

If the ſuſpender is in priſon, he ſhall not have the benefit of ſuſpenſion upon juratory caution. Ibid.

The party to whom caution is to be found, may paſs from the benefit of it, and before the ſuſpenſion

penſion or advocation paſs the ſignet, may apply to the Lords by petition, praying a remit to the Lord Ordinary to diſcuſs the reaſons on the bill;—upon which the court will remit the cauſe to the Lord Ordinary to diſcuſs the reaſons. But in ſuch caſes, the ſecretary's fees for ſigneting the ſuſpenſion, and 4 s. Scots as the fees of inrolment, ſhall be paid to the clerk of the bills within twenty-four hours after ſuch warrant ſhall be obtained, otherwiſe the warrant for diſcuſſing ſhall be cancelled.

A. S. 11th Nov. 1691

After bills of advocation and ſuſpenſion are paſſed, and caution is found, or conſignation is made, where it is required, letters of advocation or ſuſpenſion muſt paſs under his Majeſty's ſignet.

Theſe letters are ſigned by a clerk to the ſignet, and bear warrant for citing parties as in a ſummons, and a ſiſt of proceedings, or of execution, in the mean time.

Advocations are ſometimes executed by a meſſenger in the way of

of a ſummons, citing the party to appear at the day appointed. In ſuch caſe, the advocation may be called as a ſummons. This form ſeems to be competent alſo in ſuſpenſions; but as in moſt caſes the ſuſpender is deſirous that the matter ſhould lie over, the execution, and calling of ſuſpenſions in the way of ſummons, is ſeldom uſed.

After the days aſſigned in the advocation or ſuſpenſion are elapſed, the party againſt whom ſuch letters are obtained, may call for production of the advocation or ſuſpenſion, by putting up a proteſtation in the minute-book; and if the letters are not produced, the proteſtation may be extracted, after it is read in the minute-book: the effect of which is, that no regard ſhall be had, either to the advocation or ſuſpenſion; and the party who obtains the proteſtation is intitled to a warrant for payment of L. 8 Scots of expences, in caſe the ſum charged for is within 100 merks, A. S. 29th Jan. 1650.

A. S. 4th July 1661. merks, and L. 10 Scots if it ſhall exceed that ſum.

A. S. 1ſt Jan. 1709. By an act in 1709, it is ordained, "That where a purſuer before "any inferior court advocates his "cauſe, and does not inſiſt within "in *fifteen days* after admitting of "the advocation, (not reckoning "the vacancy), and cauſes call the "ſame, and give it out with the "proceſs to the defender's procura-"tors to ſee, that then, and immedi-"ately thereafter, the defender may "call for the advocation, and put "up a proteſtation at the minute-"book; whereupon the purſuer "ſhall be obliged to produce his "advocation, with the principal "proceſs, and an outgiving there-"on; otherwiſe the proteſtation "and remit ſhall not be ſcored, "but given out to be extracted; "and the defender, when the ad-"vocation is ſo produced, with "the proceſs and outgiving, ſhall "be allowed, before he returns the "proceſs, to inroll the ſame in "the roll of ſuſpenſions and advo-"cations, upon his own advocate's "return;

" return; and for that effect, al-
" lows the defender's procurators
" to keep up the proceſs ſix days
" allowed for ſeeing, and until
" the firſt *Saturday* in ſeſſion-time
" thereafter, ſo as he may get the
" proceſs inrolled."

By the ſame act, the clerks of the bills, and their deputes, are ordained, " under the penalty of " L. 5 Sterling, to give up all " proteſtation-money conſigned in " their hands, without any fees, " to the party concerned, upon " ſight of the extracted proteſta- " tion, or decreet, finding the let- " ters orderly proceeded, and re- " ceipt of the party in a diſcharge, " expreſſing the ſubſtance and " date of the warrant, without " neceſſity to leave the Lords " warrant." A. S. 1ſt Jan. 1709

If, inſtead of extracting the proteſtation, the party ſhall be deſirous to have the merits of the caſe tried, he may extract the ſuſpenſion from the ſignet; and upon production of ſuch extract under the hands of the keeper of the A. S. 9th Nov. 1680

ſignet, the Lord Ordinary, beſides the ordinary expence of proteſtation, will give large expences againſt the ſuſpender, upon account of the delay.

After production of the advocation or ſuſpenſion, the proceſs muſt be given out to the other party's advocate; who muſt give a ſigned return, in the ſame manner as in ordinary actions in the outer houſe; after which, the proceſs muſt be inrolled in the ſuſpenſion-roll.

A. S. 28th Feb. 1662. The ſuſpender's advocate ſhall alſo, with the ſuſpenſion, produce the whole eiked reaſons and vouchers, to be given up to the charger; with certification, that when the cauſe ſhall be debated, the reaſons ſhall be repelled which ſhall not be inſtructed and inſtantly verified.

This moſt uſeful order for giving in eiked reaſons and vouchers, is now out of uſe.

CHAP.

CHAP. II.

Proceedings before the Lord Ordinary in the Outer House.

AT the hearing of the cauſe, the reaſons ingroſſed in the ſuſpenſion, and referred to the charger's oath at the time of paſſing the bill of ſuſpenſion, ſhall be inſiſted on in the firſt place, and the party's oath taken, or paſſed from; and if ſuch reaſons ſhall be repelled, either as irrelevant, or as not being proved, large expences ſhall be given; and the ſuſpender ſhall pay, or conſign, the ſame, before he ſhall be heard upon any other reaſons of ſuſpenſion, either libelled or eiked, excepting ſuch reaſons as ſhall be inſtantly proved by writing. A. S. 16th Jan. 1650

If the advocator, or ſuſpender, ſhall neglect to produce the advocation or ſuſpenſion when the cauſe is called, the Lord Ordinary will grant proteſtation; which has

the ſame effect with a proteſtation put up in the minute-book.

A. S. 1ſt Jan. 1709

By an act of 1709, it is ordained, "That where-ever a judicial proteſtation, or proteſtation and remit, ſhall be admitted by the Lord Ordinary, through the keeping up of ſuſpenſions or advocations, unleſs the cauſe be again called by the Ordinary, and the ſuſpenſion or advocation alſo produced the ſame week; before the ſuſpenſion or advocation be taken in by the clerk, or the party reponed againſt the ſaid proteſtations, every ſuch party ſhall pay to the contrary party, or to the clerk for his behoof, the ſum of *ten* ſhillings Sterling." And the like ſum is ordered to be paid where the ſuſpender or advocator allows a decreet finding the letters orderly proceeded, or an act and remit, to be pronounced, for not debating the reaſons of ſuſpenſion or advocation, before the party is allowed to be heard againſt the ſaid decreet or act, unleſs application be made

to

to the Ordinary, and a ſtop obtained in writing, within ſix free days after the date of the Ordinary's decreet or remit.

If, upon hearing the reaſons of advocation, the Lord Ordinary ſhall be of opinion, that decreet ſhould paſs againſt the advocator, he may either advocate the cauſe, and pronounce decreet, or he may remit it to the court where it firſt depended. This laſt is often attended with new delays; and therefore it is more eligible, that the proceſs ſhall be advocated and tried by the Lord Ordinary, unleſs the queſtion in diſpute is of ſmall importance; in which caſe, it is ſometimes better to have the proceſs remitted to the court from whence it came, with inſtructions to the judge how to proceed, if he has done wrong.

If the decreet ſuſpended ſhall have proceeded upon the defender's being held as confeſſed, upon a reference to his oath, he ſhall not be reponed until he pay the expence of obtaining and extract-

ing the decreet before the inferior court.

If the proceedings before the inferior judge have been irregular, the Lord Ordinary will turn the decreet to a libel; but if the reaſons of ſuſpenſion are inſtantly verified, he will ſuſpend the letters.

If the reaſons of ſuſpenſion are either irrelevant, or not inſtantly verified, the letters ſhall be found orderly proceeded.

After the firſt hearing in the outer houſe, the form of proceeding, in advocations and ſuſpenſions, is the ſame as in ordinary actions.

A. S. 14th Dec. 1756 § 7. Advocations and ſuſpenſions of proceſſes of removing, ſhall be diſcuſſed ſummarily, without abiding the courſe of any roll.

CHAP.

CHAP. III.

Proceſs of Prevento termino.

IF the day aſſigned for compearance in the ſuſpenſion is long, the charger may raiſe a ſummons for ſhortening that time; which is called a *ſummons prevento termino*; but this form is now out of uſe, the day aſſigned in ſuſpenſions being ſhort.

PART

PART III.

Of Proceſs of Wakening and Transference.

AFTER a proceſs is once heard in court, if it ſhall be allowed to lie over, without any judicial proceeding, for a year and a day, it is ſaid to have fallen aſleep; and parties ſhall not be obliged to anſwer without a new citation. In ſuch caſe, a ſummons of wakening may be raiſed at the inſtance of either party, and the adverſe party may be cited to hear the proceſs wakened.

If either the defender or purſuer ſhall die during the dependence of the action, the proceſs muſt be ſiſted until proper parties ſhall appear. Anciently, the proceſs behoved to be transferred actively as well as paſſively; but now

now it is not neceſſary, upon the death of a purſuer, to transfer the proceſs actively, by raiſing a ſummons, but only to produce the perſon's title who claims under the right of the firſt party. W. & M. p. 1693. c. 15.

It is not neceſſary, in a ſummons of transference, to libel the whole proceedings of the original proceſs, as formerly; but only to recite the new purſuer's active title, and the paſſive title againſt the defender, with the concluſion of the original ſummons. A. S. 16th Feb. 1723 § 4.

Theſe two ſummonſes of wakening and transference muſt be called, given out, ſeen, and returned, as ordinary actions; but need not be inrolled in the ordinary action roll for the outer houſe.

After a ſummons of wakening is called, given out, ſeen, and returned, the proceſs may be inrolled in the hand-roll of the Lord Ordinary before whom the proceſs originally depended.

Though a ſummons of transference may be called without being inrolled, it is ſometimes called before A. S. 26th July 1688.

before the Lord Ordinary in the outer houſe as an act, and ſometimes in the regulation-roll; and a decreet of transference muſt be obtained, before any farther proceeding can be had; after which the proceſs may be proceeded in before the former Ordinary to the proceſs, as in a wakening.

After the proceſs is wakened and transferred, the proceedings in the original cauſe ſhall go on in the ſame manner as if the original parties were all alive, and the proceſs had not ſlept.

PART

PART IV.

Regulations concerning the Minute-book, the extracting of Acts and Decreets, and the Poor's Roll.

SECT. I.

Of the Minute-book.

THAT parties may have due notice of the proceedings of the court, a minute-book is appointed to be kept; in which the writer thereof is ordered to put up, and inſert, all proteſtations, acts, decreets, and aviſandums, made in the outer houſe, immediately after the pronouncing thereof; and alſo all acts and decreets paſſed in the inner houſe. A. S. 8th Nov. 1649

When a decreet, act, or proteſtation, is pronounced againſt a defender or ſuſpender in abſence, the keeper of the minute-book is ordered A. S. 28th Feb. 1662

ordered to mark it ſo in the minute-book.

A. S. 9th July 1709. By a later act, all acts, decreets, and proteſtations, are ordered to be put up in the minute-book, of the date they are ſigned.

A. S. 10th Dec. 1687 When a decreet is pronounced againſt more defenders than one, all the defenders names and deſignations againſt whom decreet is pronounced, muſt be inſerted in the minute-book; except decreets given againſt tenants in poindings of the ground, removings, and for mails and duties; wherein it ſhall be ſufficient to mention them to be tenants in ſuch a barony or tenandry: but if any of the defenders called, or a third party compearing, ſhall plead upon his right, and decreet ſhall be given againſt him, his name ſhall be inſerted in the minute-book. This act contains a certification, that if any of the defenders names ſhall be omitted to be put in the minute-book, the decreet as to that perſon ſhall be void and null.

The

The minute-book being intended as a notification of the proceedings to the practitioners in the court, was anciently read aloud in the outer houſe by the clerk, every day, before the Lord Ordinary left the bench; but latterly, the keeper of the minute-book has been in uſe to ſend the book to agents houſes, upon payment of a fee, which has rendered the notification by reading leſs neceſſary, though it is ſtill continued to be read by an agent inſtead of the clerk; and the perſon who reads it, marks the minute-book with his name: the only uſe of which is, to aſcertain the time aſſigned for giving out extracts, which is now rendered more certain, by aſcertaining the time of commencing to read the minute-book to be upon the 6th ſederunt-day of each ſeſſion, and within three days after the commencement of the Chriſtmas vacance.

A. S. 8th Nov. 1649
A. S. 3d Nov. 1671
A. S. 5th June 1725
A. S. 19th Dec. 1713

SECT. II.

Of the extracting of Acts and Decreets.

A. S. 20th Jan. 1671
A. S. 5th June 1725

ALL proteſtations, acts, interlocutors, or ſentences, which require to be extracted, excepting incident diligences, muſt be firſt put up and read in the minute-book; and no extract thereof ſhall be given out until twenty-four hours after the ſame is read in the minute-book.

A. S. 6th Feb. 1748

When a repreſentation offered againſt a decreet formerly pronounced, is refuſed, the decreet muſt again be put up in the minute-book. This decreet does not require to be read a ſecond time in the minute-book, but may be extracted upon the elapſe of three days after it is laſt put in the minute-book.

The Lords ſometimes allow acts to be extracted without abiding the reading of the minute-book; but

but this muſt be done by a particular diſpenſation in the interlocutor.

Acts and decreets againſt more debtors than one, or in competitions of rights, may be extracted in parts, without being obliged to extract the reſt of the proceedings. Act reg. 1695. §17

The clerks are intitled to the fees of extracting decreets after decreet is pronounced, though the decreet ſhall not be extracted.

This was determined in a caſe of Sir James Stewart of Burray, ingroſſed in the ſederunt-book. 20th July 1753.

By the regulations in 1695, "It "is ordained, That in place of the "allowance formerly uſed in ad- "judications or appriſings, there "be only a ſhort abbreviate made "of the decreet of adjudication, "after the manner of the ſaid al- "lowance; and that this abbreviate "be at the pronouncing of the de- "creet ſigned by the Lord Ordi- "nary, pronouncer thereof, and "given in to be recorded within Ch. II. p. 1661. c. 31. Act reg. 1695. §24

" threeſcore days after pronoun-
" cing of the decreet;" and the clerk is diſcharged to take in any abbreviate to be recorded after the expiration of the ſaid ſixty days.

Act reg. 1696. §4

By the regulations in 1696, " It
" is ordained, That for the great-
" er ſecurity and ſatisfaction of
" parties concerned, albeit abbre-
" viates fall to be written apart,
" and ſubſcribed before the ex-
" tracting of decreets; yet if any
" party ſhall deſire the ſaid ab-
" breviate to be written upon the
" back of the decreet, the ſame
" ſhall be done, if the decreet
" ſhall be extracted, and the ſame
" deſired within twice ſixty days
" after the date of the pronoun-
" cing thereof; and the ſame
" Lord Ordinary who ſigned the
" firſt abbreviate ſhall ſign the
" ſecond indorſed."

Though, by this article, it is left optional to parties to take one or two abbreviates, and one abbreviate is declared to be ſufficient; it is uſual to have two abbreviates ſigned

ſigned by the Lord Ordinary before the decreet is extracted; one of which is left with the clerk who keeps the record, and the other is given to the party after the abbreviate is recorded.

After a decreet of the Lords *in foro contradictorio* is extracted, it ſhall not be reduced and laid open upon nullities, further than *ad hunc effectum*, to hear parties for redreſs of prejudice ſuſtained by ſuch nullity; and the reſt of the interlocutors in the decreet ſhall ſtand, *tanquam res hactenus judicata*. Act reg. 1695. §18

SECT. III.

Of the Poor's Roll.

THE protection of the poor from the oppreſſion of the rich, ſeems to have been very early an object of the legiſlature. In the reign of James I. a proviſion was made by parliament for the ma-

nagement of the cauſes of the poor.

J. I. p. 1424. c. 45 The act is intitled, *Anent complaints to be decided before the judge-ordinar.* And it is thereby, among other things, ordained, " That gif there " be onie pure creature, for fault " of cunning, or diſpenſes, that " cannot, nor may not, follow his " cauſe; the King, for the love of " God, ſall ordain the judge be- " for qhuom the cauſe ſuld be de- " termined, to pur-wey, and get " a leil and a wiſe advocate, to " follow ſik pure creatures cauſes; " and gif ſik cauſes be obteined, " the wranger ſall aſſyith baith " the party ſkaithed, and the ad- " vocatis coaſtes and travel. And " gif the judge refuſis to do the " law eavenlie, as is before ſaid, " the partie compleinand ſall have " recourſe to the King, quha ſall " ſee rigorouſlie puniſhed ſik jud- " ges, that it ſall be example till " all uthers."

In conſequence of this ſtatute, the judges, both in civil and criminal courts, do aſſign counſel and agents to poor ſuitors when demanded;

demanded; and the faculty of advocates, and ſociety of clerks to the ſignet, do annually appoint ſome of their own number for the ſervice of ſuch poor litigants, in their ſeveral profeſſions. But as theſe appointments would be of very little uſe to the poor ſuitor, were the fees of court to be exacted from him, the Lords of Seſſion, upon evidence of his poverty, will grant warrant for the diſpenſing with the fees. This is called *the benefit of the poor's roll.*

The manner of obtaining this warrant, is by offering a petition to the court, which muſt bear the particular proceſs for which the warrant is to be granted; and muſt be accompanied with a certificate of the poverty of the petitioner, ſigned by the miniſter and two elders of the pariſh where he reſides. After reading this petition, the court uſually remits to the advocates and writers for the poor, to examine the grounds of the petitioner's plea, and certificate

cate of his circumſtances; and upon their report the warrant is granted, unleſs there appears no ground for the proceſs. This warrant does not extend to any other thing than the proceſs mentioned in the petition; and it continues in force only for three years; but is renewed of courſe upon application of the petitioner, in caſe the action for which it is granted is not determined within that time.

A. S. 20th Nov. 1686

The clerks to the ſignet appointed for the poor, uſually draw and ſign the ſummons or libel, and make a full memorial of the caſe for the poor petitioner; they alſo make out for him all the neceſſary writs which paſs the ſignet. But as it is no part of their duty, as clerks to the ſignet, to act as agents, the poor ſuitor is often at a loſs for want of a ſolicitor. To prevent this inconvenience, the two ſocieties of advocates and clerks to the ſignet, within theſe few years, have had ſeveral conferences; at which certain

certain regulations were propoſed for managing the cauſes of the poor; but it is to be regretted, that theſe regulations have never yet been put in execution.

FORM

FORM of PROCESS

BEFORE

The Lords of Council and Seſſion,

AS

Commiſſioners for plantation of Kirks and Valuation of Teinds.

PART I.

Of the Conſtitution of the Court.

CHAP. I.

Of the ſeveral Commiſſions granted by the King, and by Acts of Parliament.

BEFORE proceeding to the particulars of the ſeveral commiſſions granted by the King, and by acts of parliament, it will be proper to give a ſhort account of the reaſons

reaſons which induced government to grant theſe commiſſions.

In time of Popery, the clergy in Scotland had acquired a very large and extenſive property in land, by donations and mortifications made by laymen to monaſteries, abbeys, and other religious houſes; the tithes and patronages of many churches had been alſo doted to theſe ſeveral religious corporations.

J. IV. p. 1503. c. 91 By an act in 1503, the vaſſals of the King, as well ſpiritual as temporal, during the King's life, were allowed to let their lands in feu, without diminution of the rental; and in conſequence of this, and ſeveral other acts of parliament, churchmen were in uſe of feuing out their lands, with the tithes included, for payment of a certain feu-duty both for ſtock and tithe. Theſe tithes, from the words of the grant, got the name of *decimæ incluſæ*; and having been thus conſolidated with the ſtock, were underſtood to be held by impropriation by the perſons who acquired

acquired right to them; and conſequently were exempted from all the burdens impoſed on tithes after the reformation.

When the reformation took place, the temporalities of benefices were annexed to the crown by act of parliament; notwithſtanding which, many of the lands and eſtates which had belonged to the church were erected into temporal lordſhips, and were granted by the King to his favourites. In moſt of which grants, the tithes and patronages, which had formerly belonged to the abbeys, *&c.* were alſo comprehended. J. VI. p. 1587. c. 29.

The church being thus ſtripped of her property, it became neceſſary to make ſome proviſion for the clergy. For this purpoſe, as early as 1561, it was ordained by act of council, that the third of all benefices ſhould be applied to the maintenance of the miniſters in the firſt place, and the ſurplus to the maintenance of the Queen's houſe: and this aſſumption of the J. VI. p. 1567. c. 10.

J. VI. p. 1592. c. 123. thirds of benefices was afterwards ratified by parliament.

Hope's Pract. Ob. tit. 2. §17. &c. In 1561, a commiſſion was granted by the King and Queen to ſeveral of the nobility and miniſters, under the name of, *The commiſſion of plat for modifying ſtipends to miniſters.* This court met yearly at Edinburgh in the month of November; and continued to act until the biſhops were reſtored in 1606.

J. VI. p. 1617. c. 3. In 1617, a commiſſion was granted by parliament to eight perſons of each eſtate, *viz.* eight biſhops, eight lords, eight barons, and eight burgeſſes, who were appointed to meet at Edinburgh.

By the tenor of this commiſſion, it was neceſſary that five commiſſioners of each eſtate ſhould be preſent, and agree in one voice in every judgement and act of the court; otherwiſe ſuch proceeding was declared not to be valid.

The buſineſs committed to the management of theſe commiſſioners, in ſo far as concerns the matters now to be treated of, was,

1. To

1. To modify a perpetual local ſtipend, out of the tithes, to the miniſters of all churches which had not been formerly provided either with miniſters or ſtipend; and alſo to the miniſters of ſuch churches as had been provided with both, in caſe ſuch ſtipend did not amount to 500 merks Scots (L. 27 : 15 : $6\frac{2}{3}$ Sterling) in money, or five chalder of victual, beſides manſe and glebe.

2. To unite two or more pariſhes into one, provided the fruits or tithes of one of ſuch pariſhes was not ſufficient to pay the ſtipend; in which caſe the patrons were to have the right of preſentation alternately.

3. Where the tithes of the pariſh did not amount to the value of 500 merks, and where an union was inconvenient, the commiſſioners were impowered to modify the whole tithes of the pariſh to the miniſter, beſides manſe and glebe.

4. In making ſuch modifications, the commiſſioners are directed

rected to have no regard to tacksmen, patrons, or others, pretending right to the tithes; but as a recompence to the tacksmen for the loss occasioned by such modification, they are authorised to grant them a prorogation of their tacks.

5. The minimum of the stipend to be modified to the minister, is ascertained to be 500 merks Scots, (*i. e.* L. 27 : 15 : $6\frac{2}{3}$ Sterling), or five chalders victual, excepting where the tithes of the parish do not amount to so much; and the maximum is limited to 1000 merks, (*i. e.* L. 55 : 11 : $1\frac{1}{3}$ Sterling), or ten chalders victual.

In order to enable the commissioners to execute the commission, they are impowered to summon titulars *, patrons, tacksmen, and all others pretending to have right to the tithes, to produce their writings and title-deeds, to be judged of by the commissioners; whose sentence is declared to

* One who has a title to the tithes.

be

be final; and the commiſſion is declared to ſubſiſt only until the term of Lammas 1618.

In 1621, another commiſſion was granted by parliament, much to the ſame purpoſe with the former; only a few variations were made with reſpect to the number and quorum of the commiſſioners; to whom an additional power was alſo granted, to divide pariſhes when too large; but with proviſo, that the conſent of the patron, tackſmen, and other parties having intereſt, ſhould be had, both to the ſeparating and uniting of pariſhes. J. VI. p. 1621. c. 5.

This commiſſion was limited to a year and day after 10th January 1622.

Charles I. upon his acceſſion to the crown, having revoked all the grants of church-lands made by King James his father, a ſummons of reduction of theſe grants was executed in name of his Majeſty's Advocate. Aug. 1626

This greatly alarmed the perſons who were poſſeſſed of theſe

grants, and occaſioned an application to be made to the King in name of ſome of the grantees, to have their properties ſecured to them: the conſequence of which was, that ſeveral commiſſions were granted by the King for ſettling thoſe matters; and the ſeveral parties intereſted alſo ſubmitted their reſpective rights to his Majeſty; who pronounced four ſeveral decreets-arbitral thereupon. There were alſo ſeveral acts of parliament paſſed, and commiſſions granted for the better regulating all thoſe affairs; the purport of which ſhall be hereafter explained as they occur in their order.

1628. & 1629.

In 1627, a commiſſion was granted by the King under the great ſeal, to certain of the clergy, nobility, and barons, impowering them to treat with the proprietors concerning the erection and temporalities of benefices, teinds, parſonage and vicarage, and certain other matters and things, which his Majeſty alledged were the property of the crown, or principality,

27th Jan. 1627.

ty, and had been unlawfully acquired and poſſeſſed by his ſubjects. This commiſſion was called the commiſſion of *Surrenders and Teinds*; and by the tenor thereof, was only to ſubſiſt to the 1ſt of Auguſt 1627; but was afterwards renewed three ſeveral times, with ſome ſmall variations, *viz.* 9th July 1630, 16th November 1630, and 7th January 1631.

The commiſſioners named in 1627, in conſequence of a warrant from the King, gave directions to the ſeveral preſbyteries, to make choice of the moſt fit and indifferent perſons, within their reſpective preſbyteries, to be ſubcommiſſioners for trying the valuations of tithes, according to particular directions ſent to them for that effect: and theſe nominations were ordered to be reported to the general commiſſion.

Upon report of theſe ſeveral nominations by the reſpective preſbyteries, commiſſions were iſſued by the general commiſſion to the ſeveral perſons named by the preſbyteries;

byteries; and the powers granted to the ſubcommiſſioners are as follows: To try and inform themſelves, by all lawful means and ways, of the true worth of the lands of each pariſh, in ſtock and teind, where the land hath been bruiked in ſtock and teind in time bygone, and what the lands pay preſently, what they have paid in time bygone, and what they may pay of conſtant rent of ſtock and teind in time coming; and that they report to the general commiſſion the juſt and true worth thereof, in conſtant rent, to their judgement; and alſo to inform themſelves, by all lawful means, of the conſtant rent and worth of the teinds, both great and ſmall, where the teinds have been drawn ſeverally from the ſtock, by the titular or his tackſman, not being heritors for the ſpace of ſeven years, within fifteen years preceding the date of the commiſſion.

By the ſaid commiſſions, the ſubcommiſſioners were alſo impowered, in caſe the heritor ſhould deſire

deſire it, to try the rent of the land along with the teind, according to the true and conſtant rent of the land; and the commiſſions to the ſubcommiſſioners were publiſhed by a proclamation iſſued in the King's name, and under his ſignet.

By an act in 1633, it is ordained, That his Majeſty ſhall have an annuity of 6 *per cent.* out of all the teinds of the kingdom, excepting the teinds then paid to biſhops, teinds paid to miniſters in name of ſtipend, for ſerving the cure, and to colleges, hoſpitals, and other pious uſes. Ch. I. P. 1633. c. 15.

This annuity was granted by King Charles I. to James Livingſton, a groom of his bedchamber, in ſecurity of a ſum of L. 10,000 Sterling; which right was afterwards acquired by the Earl of Loudon: and in 1664, the levying of theſe annuities was ſtopped by the King's warrant; ſince which time, the King's annuity has not been levied. Stair's In. b. 2. tit. 8. § 13.

By

Ch. I. p. 1633. c. 17.

By another act, in 1633, it is ordained, "That there ſhall be no "teind-ſheaves, or other teinds, "parſonage or vicarage, led and "drawn within the kingdom; "but that each heritor and life-"renter of lands ſhall have the "leading and drawing of their "own teind, the ſame being firſt "truly and lawfully valued, and "they paying therefor the price "ſpecified in the act, in caſe they "be willing to buy the ſame, or "otherwiſe paying therefor the "rate of the teind ſettled by the "ſaid act: and it is thereby alſo "declared, That the juſt and true "rate of teinds is, and ſhall be, "the fifth part of the conſtant "rent which each land payeth in "ſtock and teind, where the ſame "are valued jointly; and where "the teinds are valued apart and "ſeverally, that the juſt rate "thereof is, and ſhall be, ſuch as "the ſame is already, or ſhall be "hereafter valued and proved be-"fore the ſaid commiſſioners or "ſubcommiſſioners, deducting the

"*fifth*

" *fifth* part thereof for the eaſe of " the heritors; reſerving always " liberty to ſuch as ſhall find " themſelves enormly hurt by the " leading of the ſaid valuations, " to purſue for rectifying of the " ſame, before the commiſſioners " appointed by his Majeſty and e- " ſtates for that effect. And it is " alſo thereby declared, That the " price of all teinds which may " be ſold, conſiſting either in mo- " ney, victual, or other bodies of " goods, is, and ſhall be, ruled " and eſtimate according to nine " years purchaſe; the prices of " victual, and other bodies of " goods whereof the teind conſiſts, " being redacted in money, ac- " cording to the worth and price " of the victual and goods in each " part of the country to the which " the ſame is, and ſhall be prized, " and eſtimate, by his Majeſty's " commiſſioners, appointed, or to " be appointed, to that effect."

The ſaid act alſo provides, That in caſe an heritor of lands life-rented by another perſon, ſhall purchaſe

purchaſe his teinds, the liferenter ſhall be allowed to draw his own teinds, upon payment of the rate at which they are valued; and that if the teinds are not purchaſed, both the heritor and liferenter, reſpectively, ſhall have the drawing of their own teinds at the ſaid rates.

Ch. I. p. 1633. c. 19.

In 1633, a new commiſſion was granted by parliament to ſeveral perſons of each eſtate, for regulating the matter of tithes. By this commiſſion, the commiſſioners are ordered to meet at Holyroodhouſe, or Edinburgh; and they are impowered to proſecute and follow forth the valuation of whatſoever teinds, parſonage or vicarage, as were then unvalued; and "to re- "ceive the reports from the ſub- "commiſſioners appointed with- "in ilk preſbytery, of the valua- "tion of whatſoever teinds led "and deduced before them, ac- "cording to the tenor of the ſub- "commiſſions direct to that ef- "fect; and to allow or diſallow "the ſame, according as the ſame "ſhall

" ſhall be found agreeable or diſ-
" agreeable from the tenor of
" their ſubcommiſſions."

" The commiſſioners are alſo
" impowered to rectify whatſoever
" valuations, led or to be led, to
" the enorm prejudice of the ti-
" tulars, and to the hurt and de-
" triment of the kirk, and preju-
" dice of the miniſters mainte-
" nance and proviſion, or of his
" Majeſty's annuity; and alſo to
" appoint committees, or ſub-
" committees, of their own num-
" ber, to receive the reports of the
" ſaid valuations made or to be
" made, and to receive, admit,
" and examine witneſſes, and to
" take parties oaths, with their
" depoſitions, where the ſame is
" referred to oath; and to give
" ſuch further power to the ſaid
" committees or ſubcommittees
" of their own number, as they
" ſhall think fit; and if need be,
" to appoint ſubcommiſſioners,
" not being of their own number,
" within any parochine or preſbe-
" trie of the country, for leading

" and deducing of the ſaid valu-
" ations, and to receive the re-
" ports thereof, allow or diſallow
" of the ſame; and, generally, to
" ſet down whatſoever order or
" courſe, which ſhall be thought
" fit and expedient for diſpatch of
" the ſaid valuations, rectifying
" thereof, or final cloſing of the
" ſame."

The commiſſioners are alſo impowered, " after the cloſing and " allowance of the valuations of " ilk kirk and parochin, to ap-" point, modifie, and ſet down, " a conſtant and local ſtipend, " and maintenance, to ilk mini-" ſter, to be paid out of the teinds " of ilk parochin, according to the " tenor of the ſeveral acts of par-" liament:" And it is declared in the commiſſion, that the proviſion to be made to miniſters, ſhall not be under 8 chalders of victual, or 800 merks Scots, (*i. e.* L. 44, 8 s. 10$\frac{2}{3}$ d. Sterling), unleſs when, upon ſpecial reaſons given, the commiſſioners ſhall adjudge a leſs ſum.

The

The commiſſioners are alſo impowered, " to divide ample and " ſpacious parochins, where the " ſame ſhall be found neceſſary " and expedient, or to unite di- " vers kirks, in whole or in part, " to others, and to ratify and al- " low, after trial and conſidera- " tion, ſuch union, or diſmem- " bering of parochins, as hath " been formerly made by virtue " of the former commiſſions."

The commiſſioners are likewiſe impowered " to order, that every " heritor and liferenter of lands, " ſhall have the leading of their " own teinds, parſonage and vi- " carage thereof, they paying the " price contained in the act of " parliament, in caſe they be wil- " ling to buy the ſame from the " titular having power to ſell, or " otherwiſe paying the rate of " teind expreſſed in the ſaid act: " And to that effect, the commiſ- " ſioners are impowered to ſet " down the prices of ſaleable " teinds, according to the worth " thereof in each part of the coun-

" try, where the ſame grow and
" are bred; and alſo to ſet down
" ſuch good and ample ſecurities,
" as may ſtand by law, both for
" the buyers of teinds, to the ef-
" fect the titulars may be fully
" denuded in their favours; and
" alſo for ſecurity to the titulars
" and ſellers of the price due to
" be paid to them for the ſaid
" teinds; and alſo to ſet down the
" ſecuritie in favour of the titu-
" lars and of the miniſters, ſo far
" as concerns the maintenance aſ-
" ſigned to them, for good, thank-
" ful, and timeous payment of
" the rate of teind, where the ſame
" are not, or cannot be ſold; and
" to diſcuſs and determine all
" queſtions which may ariſe be-
" twixt the titulars and heritors,
" anent the price of teinds, ac-
" cording to the nature and qua-
" litie of the rights to be ſold,
" whether the ſame be heritable
" or temporal, and to proportio-
" nate the price accordingly; and
" alſo to divide the price of teinds
" betwixt

" betwixt heritors and liferenters " thereof, and betwixt titulars, " tackſmen, and others, who have " ſeveral and diſtinct rights to the " ſaid teinds ſaleable, according " to the qualitie of their rights; " and alſo to cauſe the titulars " who ſell their teinds, to exhibit " their rights and titles, to the ef- " fect that they may be lawfully " denuded thereof, in favour of " the ſaid heritors and liferenters " reſpectively, (without prejudice " to his Majeſty's annuity, *&c.*), " and to decide and determine in " all other points which may con- " cern the leading and drawing of " teinds, and buying of the ſame, " or payment of the rate thereof."

It is alſo provided by the ſaid commiſſion, " That the vicarages " of each kirk being a ſeveral be- " nefice and title from the parſo- " nage, ſhall be ſeverally va- " lued."

This commiſſion being only temporary, ſeveral new commiſ- ſions were afterwards granted by

W. & M. 1690. c. 30 Ib. 1693. c. 24. parliament to the like effect *; particularly in 1690 and 1693: and in the laſt of theſe commiſſions, there are ſome new rules laid down with reſpect to proceſſes of ſale of teinds, and allocation of miniſters ſtipends.

Ch. II. p. 1661. c. 61. By the commiſſion granted by parliament 1661, it is declared, That all and whatſoever valuations, acts, ſentences, and decreets, done, concluded, and decerned, by virtue of any commiſſion granted by the pretended parliaments in 1640, 1641, *and downwards to the reſtoration*, ſhall ſtand valid, notwithſtanding both the general and particular reſciſſory acts paſſed in that parliament, excepting ſuch decreets and ſentences given in favour of miniſters for their ſti-

* The dates of the ſeveral commiſſions granted by parliament are,

Parl. 1641, c. 30.	Parl. 1672, c. 15.
1644, c. 24.	1685, c 28.
1647, c. 32.	1686, c. 22.
1649.	1690, c. 30.
1661, c. 61.	1693, c. 24.
1663, c. 28.	

pends,

pends, or for dividing, uniting, annexing, or building of kirks, which ſhall be found to have been unjuſtly or exorbitantly decerned; the determination whereof is referred to the commiſſioners, who are impowered to annul or alter ſuch acts, ſentences, and decreets, conform to the laws and practick preceding 1649.

In 1707, the power of theſe ſeveral commiſſions was veſted in the Lords of Council and Seſſion, and has continued ſo ever ſince. Anne, p. 1707. c. 9.

By an act of King William, all tithes which had not before that time been heritably diſponed, are declared to belong to the patron of the pariſh where the tithes lie; but ſubject always to tacks formerly granted, and prorogations thereof, as alſo to miniſters ſtipends, and all other burdens to which the tithes were formerly ſubjected. And by this act, the patron is obliged to ſell to each heritor the tithes of his own lands, at *ſix years purchaſe*, according as the ſame ſhall W. & M. 1690. c. 23

ſhall be valued by the commiſſioners.

W. & M. p. 1693. c. 26. This laſt act was afterwards extended to the patrons of all parſonages, and other benefices, without exception.

CHAP. II.

Of the Judges, and other officers of the court, as eſtabliſhed in 1707.

THough the judges of this court are now the ſame with thoſe of the court of ſeſſion, yet they are two diſtinct courts. Each of them have their own proper officers and juriſdiction. The form of proceeding in both is in many reſpects the ſame, but in ſome particulars it is different.

The court itſelf is called *the commiſſion for plantation of kirks and valuation of teinds;* and petitions, and other applications to the court, are addreſſed to *the Lords of Council and Seſſion, as Commiſſioners for plantation of kirks and valuation of teinds.*

Nine

Nine of the judges are a quorum, as in the court of ſeſſion.

There is only one principal clerk. This officer was formerly appointed by the Lord Regiſter, and acted by deputation from him; but now the clerk has his commiſſion from the King. There is alſo one depute-clerk, who acts by commiſſion from the principal clerk; and both theſe officers have their commiſſions for life: and there is one extractor, appointed by the principal clerk.

By the act conſtituting the court, the macers of privy council, who attended the former commiſſions of parliament, are ordered to attend and officiate in this court. There are now only two macers who attend the court; theſe have been named by the judges.

The fees of all theſe ſeveral officers are ſettled by two acts of ſederunt of the court in 1708. 17th Nov. and 22d Dec. 1708

The court is appointed to ſit every Wedneſday in the afternoon during the ſitting of the ſeſſion: it now ſits each Wedneſday immediately Anne, p. 1707. c. 9.

diately after the court of ſeſſion riſes.

CHAP. III.

Of the Juriſdiction of the Court.

Anne, p. 1707. c. 9.

THE juriſdiction of the court is defined by the act conſtituting it. By that act, the Lords of Seſſion are impowered to judge and determine "in all affairs and "cauſes whatſoever, which by "the laws and acts of parliament "of this kingdom, were formerly "referred to, and did pertain and "belong to the juriſdiction and "cogniſance of the commiſſions "formerly appointed for that ef-"fect, as fully as the Lords do, "or may do, in other civil cauſes; "and particularly to determine in "all valuations and ſales of teinds, "and to grant augmentations of "miniſters ſtipends, prorogations "of tacks of teinds, to disjoin "too large pariſhes, to erect and "build new churches, to annex

"and

" and diſmember churches as they " ſhall think fit, conform to the " rules laid down, and powers " granted, by the 19th act of par- " liament 1633, 23d and 30th " acts of the parliament 1690, and " 24th act of the parliament 1693, " in ſo far as the ſame ſtand un- " repealed; the tranſporting of " kirks, disjoining of too large " pariſhes, or erecting and build- " ing of new kirks, being always " with the conſent of the heritors " of three parts of four at leaſt, " of the valuation of the pariſh " whereof the kirk is craved to be " tranſported, or the pariſh to be " disjoined, and new kirks to be " erected and built; the miniſter, " in the mean time, to ſerve the " cure in the preſent kirk of the " pariſh."

The records of this court having been burnt by an accidental fire, in order to ſupply this loſs, it is by the ſaid act ordained, " That " all authentic extracts from the " ſaid records be brought in; and " being preſented to the Lords, be " recorded Anne, p. 1707. c. 9.

" recorded in a particular regiſter;
" and that the extracts ſo brought
" in, be kept by the Lord Clerk-
" Regiſter and his depute, clerks
" to be appointed by him for that
" effect, as their warrants; which
" ſhall be held as valid and au-
" thentic as the principal warrants
" themſelves." The Lord Regiſter, and his deputes, are ordained to give new extracts *gratis* upon giving in the old ones; and extracts from the new record are declared to be as effectual as the old ones. And upon proper evidents and adminicles, the court is authoriſed to make up the tenor of decreets, whereof extracts are amiſſing, and the regiſters loſt in the fire.

Anne, p. 1707. c. 9.

W. p. 1690. c. 30.

The court has alſo a power of judging of the ſentences of former commiſſions, as well as reviewing thoſe of the preſent commiſſion; but under a proviſo, That the miniſters of the goſpel, and their ſucceſſors, ſhall not be prejudged of the ſtipends, either then poſſeſſed by them, or which had

had before that time, or ſhould thereafter be, modified to them by the commiſſion, at the rates before mentioned.

The judges of this court have likewiſe a power of regulating the form of judicial proceedings in the court. Ch. I. p. 1633. c. 19.

T PART

PART II.

Of the Form of Proceſs.

HAVING given a general view of the conſtitution of this court, and of the purpoſes for which it was firſt erected, the form of proceſs falls next to be conſidered; which, for method's ſake, ſhall be treated of in the following order.

1. Of the preliminaries of proceſs.

2. Of the proceedings in court after the cauſe is inrolled.

3. Of extracts.

And as the form of proceeding in this court is in a great meaſure ſimilar to that in the court of ſeſſion, ſuch particulars only ſhall be mentioned as are different from the form in that court, referring to the former part of this treatiſe for the reſt.

CHAP.

CHAP. I.

Of the Preliminaries of Proceſs.

SECT. I.

Of the Purſuer and Defender.

BEfore proceeding to the particular forms of proceſs, it will be neceſſary to conſider who are the proper purſuers and defenders in the ſeveral actions uſually brought before this court.

In general, every perſon who has a claim ſubject to the judgement of the court, may be a purſuer; and every perſon who has an intereſt to object to ſuch claim, muſt be called as a defender.

Theſe purſuers and defenders are regulated according to the nature of the ſeveral actions in which they are concerned; and ſhall be

conſidered in the following order.

1. A proceſs of valuation and ſale of tithes, may be brought at the inſtance of any heritor or liferenter who has right to lands, or other real ſubjects, out of which tithes are payable; and the proper defenders in this action are, the titular, or patron if there is no titular, tackſman in poſſeſſion of drawing the tithes, and miniſter of the pariſh where the tithes lie.

2. Where a valuation of tithes has been made by the ſubcommiſſioners, and has not been approved by the general commiſſion, a proceſs of approbation of ſuch valuation is competent, either at the inſtance of the heritor or liferenter of the lands out of which the tithes are payable, or of the titular, or patron if he has a right to the tithes, and their tackſmen in poſſeſſion of drawing the tithes. The proper defenders to this action are, the titular, or patron if he has right to the tithes, heritor, liferenter, tackſmen in poſſeſſion of

of drawing the tithes, and miniſter of the pariſh where the tithes are produced, leaving out the purſuer.

In the general commiſſion granted by parliament in 1663, and other ſubſequent commiſſions, there is no power given to the commiſſioners to receive the reports of the ſub-commiſſioners; which gave riſe to a doubt as to the powers of the preſent commiſſion to approve of theſe reports; and this was ſupported by an additional plea of preſcription: but both theſe objections to the competency of a proceſs of approbation, have been repelled by the court; and the point is now finally eſtabliſhed by a decree of the houſe of Lords, in the caſe of the heritors of Drymen *.

3. A proceſs of modification or locality of miniſters ſtipend, may be brought, at the inſtance, either of the titular, or patron, if he has

* 1744, Lord Monzie againſt Officers of State; — 1746, Murray of Philiphaugh againſt Lord Blantyre; — 2d February 1757, Duke of Montroſe, and other heritors of the pariſh of Drymen, againſt Officers of State.

right to the tithes: it may alſo be brought in name of the miniſter ſerving the cure. And the proper defenders to this action are, the titular, patron, tackſman in poſſeſſion of drawing the tithes, and the heritors and liferenters liable in payment of tithes in the pariſh, leaving out the purſuer.

4. A proceſs for prorogation of a tack of tithes, may be brought at the inſtance of the tackſman. The proper defenders to this action are, the titular, or patron, if he has a right to the tithes, and heritors and liferenters whoſe tithes are comprehended under the tack.

Anne, 1707. c. 9. 5. Though, in tranſporting of churches, disjoining of too large pariſhes, and erecting or building of new churches, the conſent of the heritors of three parts of four, at leaſt, of the valuation of the pariſh, is required *; yet an action

* The conſent of three fourths of the heritors was found not to be neceſſary in an erection of a church within a royal borough; Magiſtrates of Glaſgow againſt the Preſbytery of Glaſgow, 3d Auguſt 1763.

for

for theſe purpoſes may be brought, either at the inſtance of the patron, or of the preſbytery alone; and the proper defenders in ſuch action are, the titular, patron, heritors, liferenters, and miniſters of the pariſhes to be united or disjoined, and the preſbytery within whoſe bounds ſuch pariſhes lie; leaving out the perſon at whoſe inſtance the action is brought.

6. Any perſon who thinks himſelf injured by a decreet, may bring a proceſs of reduction of it; and all the perſons concerned in the decreet to be reduced, or their repreſentatives or diſponees, muſt be cited as defenders.

Here it may be proper to obſerve, that by the commiſſion 1690 it is provided, that "where "valuations are lawfully led a-"gainſt all perſons having inte-"reſt, and allowed by former "commiſſions, the ſame ſhall not "be drawn in queſtion, nor rec-"tified, upon pretence of enorm "leſion at the inſtance of the mi-"niſter, (not being titular), or at "the

"the inſtance of their Majeſties "Advocate, in reſpect of their "Majeſties annuity; except it can "be proven, that colluſion was u-"ſed betwixt the titulars and he-"ritors, or betwixt the procura-"tor-fiſcal and the heritors and "titulars; which colluſion is de-"clared to be, when the valuations "are led with the diminution of "the third part of the juſt rent "which was payable the time of "the valuation; which diminu-"tion ſhall be proven by the par-"ty's oath."

Anne, 1707, c. 9. 7. Every perſon who has an intereſt in a decreet which has been loſt, and whereof the record was deſtroyed by the fire which happened in the office in 1700, may raiſe a proceſs of proving the tenor of ſuch decreet; and every other perſon having intereſt in the decreet, muſt be called as defenders to the action.

If, at the time of commencing any of theſe actions, the pariſh concerned ſhall happen to be vacant, the preſbytery muſt be called

ed as a party to the action: and to ſave expence in executing the ſummons, all the members of the preſbytery may be cited when aſſembled in preſbytery, by delivering one copy of citation to the moderator in name of the preſbytery; but if the ſummons is not executed while the preſbytery is ſitting, each of the members muſt be cited in common form.

When his Majeſty has an intereſt in any of theſe ſeveral proceſſes, the officers of ſtate are called as defenders to the action for his Majeſty's intereſt, by affixing an edictal citation on the wall of the court of exchequer *.

* The officers of ſtate at preſent are well known. Thoſe before the union were,

1. The Chancellor,
2. The Treaſurer,
3. The Lord Privy Seal,
4. The Secretary,
5. The Lord Regiſter,
6. His Majeſty's Advocate,
7. The Treaſurer Depute,
8. The Lord Juſtice-Clerk.

SECT.

SECT. II.

Of the Summons and Execution.

THE ſummons in this court, as in the court of ſeſſion, is iſſued in the King's name, and under his ſignet, and is executed by a meſſenger at arms; but it differs from that of the court of ſeſſion in the following particulars.

Anne, p. 1707, c. 9. 1. The ſummons in this court is ſigned by the clerk of court, and not by a clerk to the ſignet.

2. It is iſſued blank, and may be executed before the libel is filled up; whereas the ſummons in the court of ſeſſion muſt be complete before it can paſs the ſignet.

3. The ſummons proceeds upon one diet of ſix days, in caſe the defender reſides in Scotland; and ſixty days, if he is out of Scotland: if the defender reſides in Orkney, or Shetland, it muſt be on forty days warning.

4. It

4. It is not neceſſary that the defender ſhall get a full copy of the libel when the ſummons is executed againſt him.

The parſonage and vicarage tithes being ſeparate benefices, muſt be valued ſeverally; and therefore a libel in a proceſs of valuation ought to contain that ſeparate concluſion. Ch. I. p. 1663, c. 19

SECT. III.

Of the calling and inrolling of Summonſes.

AFter the day of compearance is paſſed, the ſummons muſt be called by the clerk on the Wedneſday immediately before the ſitting of the court; and if appearance is made for any of the defenders, it muſt alſo be given out and returned, as in the court of ſeſſion; but the form of tabling and returning defences with the proceſs is not requiſite.

The court is ordained to call and Anne, 1707, c. 9

and diſcuſs proceſſes ſummarily, conform to a roll to be made up and kept by the clerk.

A. S. 11th June 1707. By an act of ſederunt of this court in 1707, the clerk is ordered to keep a book of inrolment of cauſes; from which he is to make out, and affix on the walls both of the inner and outer houſe, two rolls of cauſes each Monday morning, *viz.* one roll of *ordinary actions*, and another roll of *concluded cauſes*. But the laſt part of this act is gone into diſuſe, and the cauſes are now all inrolled in one roll. The court alſo generally calls all the cauſes in the roll at one ſederunt.

A. S. 31ſt Jan. 1711. By an act in 1711, the clerk is ordered to give notice to his Majeſty's advocate, or ſolicitor for tithes, of all cauſes wherein the officers of ſtate are called as defenders, as ſoon as the ſummons is called.

SECT.

SECT. IV.

Of tithes excepted from the acts for sale.

THough the owners of real property in Scotland in general, enjoy the particular privilege, not only of valuing and drawing their own tithes, but alſo of purchaſing them at an eaſy rate; yet it is to be obſerved, that the privileges of purchaſing is ſubject to the following exceptions.

1. Tithes allocated for a ſtipend to a miniſter.

2. Tithes of lands which have been feued out by an heritor having right both to ſtock and tithe, either without the tithes, or with a reſervation of them. W. P. 1693. c. 24.

3. Tithes formerly belonging to biſhops, now to the King.

4. Tithes belonging to colleges and hoſpitals, or mortified for pious uſes before 1693.

The ſeveral proprietors of thoſe tithes which are excepted, cannot be compelled to ſell them, though all ſuch tithes may be valued; and the proprietors of the ſubjects out of which theſe tithes are payable, are intitled to draw their tithes upon payment of the proven value thereof, excepting the tithes payable to miniſters in name of ſtipend, which muſt be paid either in kind or money, according as they are aſcertained, either by the uſe of payment, or by a decreet in favour of the miniſter.

CHAP. II.

Of the proceedings in court after the cauſe is inrolled.

AFter a ſummons of valuation and ſale is executed, the purſuer is intitled to draw his own tithes from the date of citation; but if he ſhall not inſiſt in his pro-
W. & M. p. 1693. c. 24 ceſs, and ſhall allow a proteſtation to go againſt him, ſuch purſuer ſhall

ſhall not be intitled any longer to draw his own tithes.

As there is no minute-book in this court, this proteſtation cannot be obtained until the ſummons is called in courſe of the roll; when the defender's advocate may inſiſt for ſuch proteſtation, if the purſuer does not chuſe to proceed in his action.

The proceedings after the cauſe is inrolled, are various, according to the nature of the ſeveral actions. Theſe ſhall be treated of under the following heads: 1. General rules applicable to every proceſs; 2. Rules peculiar to particular actions.

SECT. I.

General rules applicable to every proceſs.

1. ALL proceſſes in this court are heard by the court in the firſt inſtance, and not by an

Ordinary, as in the court of ſeſſion.

2. When a cauſe is called in courſe of the roll, and deleted upon non-appearance of the purſuer, the clerk is diſcharged to inrol it again, until an amand of 10 s. is paid to the poor's box.

A. S. 8th Nov. 1738

This act is gone into diſuſe.

The commiſſioners appointed by the commiſſion 4th April 1627, made an order, that all procurators compearing before them, ſhould have written mandates regiſtered in the commiſſion-books. This is now in diſuſe. But a decreet given upon an advocate's conſent, not ſubſcribed by him, was found null, 20th July 1664.

Forbes on Tithes, c. 9. § 2.

3. At the firſt calling of the cauſe in courſe of the roll, parties are heard on the libel and defences reſpectively; after which, if the cauſe is ripe for a deciſion, the court will give judgement: but if a proof is neceſſary, the court will pronounce an act of *litiſconteſtation*, allowing a proof to both parties, and grant diligence for citing

citing witneſſes, and a commiſſion if required.

4. Upon reporting the execution of the firſt diligence, the court will grant a ſecond diligence if required. This is obtained by a motion from the bar upon calling the cauſe, after being inrolled for that purpoſe.

5. When the proof is concluded, and the day aſſigned by the act is elapſed, the cauſe may be inrolled; when the court will make aviſandum with the proof, and grant circumduction, and will remit the cauſe to an Ordinary to prepare the ſtate; after which, the proceedings are the ſame as in a concluded cauſe in the court of ſeſſion.

6. The Ordinary for examining witneſſes, and preparing ſtates in this court, is generally the Lord Ordinary officiating in the outer houſe in the court of ſeſſion for the time; but when an Ordinary has prepared a ſtate in a proceſs of modification, it is uſual to remit

the preparing of the ſtate in the locality to the ſame Ordinary.

7. The cauſes in this court which are remitted to Ordinaries, are inrolled in the Lord Ordinary's hand-roll; and are called at the ſide-bar in the morning, with the other cauſes depending before the ſame Ordinary in the court of ſeſſion.

8. When a party thinks himſelf injured by an interlocutor of a Lord Ordinary, he may offer a repreſentation to the Lord Ordinary againſt ſuch interlocutor, in the ſame way as in the court of ſeſſion; but neither the time for giving in ſuch repreſentations, nor the number of them, are limited.

9. The buſineſs of the Lord Ordinary in this court being only to examine witneſſes, or to prepare the ſtates of proof, and to report, there is ſeldom occaſion to complain to the court of their interlocutors; and therefore there is no act of ſederunt limiting the time for giving in petitions to the court complaining of ſuch interlocutors.

10. By

10. By an act of ſederunt in 1722, the clerk and his depute are diſcharged to receive any more petitions than one againſt *an interlocutor of the court*; and it is thereby declared, "That the Lords "will not receive any more re-"claiming petitions than one, un-"leſs upon new documents or "matters of fact, and ſufficient e-"vidence given that the ſame "was recently come to the party's "knowledge." A. S. 31ſt Jan. 1722

11. Petitions againſt interlocutors of the court are ordered not to be received, unleſs they are given in on or before the *third* ſederunt-day after the interlocutor reclaimed againſt is pronounced. A. S. 22d Feb. 1749

12. Petitions, anſwers, and informations, are ordered to be put into the Lords and clerks boxes * on the Tueſday afternoon preceding the day of adviſing; with the exception of the following petitions, which may be given in to A. S. 7th Dec. 1709

* The Lords boxes are the ſame in this court as in the court of ſeſſion; and papers muſt now be put in before twelve o'clock.

court

court without being put into the boxes.

(1.) Petitions for recording decreets of former commissions.

(2.) Petitions against acts or decreets ready to be extracted, when there is no time for making copies of the petition.

A.S. 26th Mar. 1707

13. Anciently summons of wakening was not necessary in this court; but the processes which had depended before former commission-courts, not having been called for several years before the last appointment of this court in 1707, the court made an act, ordering such processes to be wakened by a summons; and though this act seems only to relate to processes then depending, yet by use it is now extended to every process in the court which has lain over uncalled for year and day, as in the court of session.

14. If any of the defenders shall happen to die during the dependence of the action, his heir may be called by an incident diligence, a summons of transference not being

ing neceſſary in this court as in the court of ſeſſion; and ſuch diligence may be obtained by a motion from the bar upon an inrolment.

SECT. II.

Rules peculiar to particular actions.

HAving premiſed the general rules which are applicable to every action in this court, the particular matters peculiar to each action ſhall next be ſtated.

§ 1. *Proceſs of Valuation and Sale.*

In a proceſs of valuation and ſale, the chief things to be obſerved with reſpect to the proof is, That there ſhall be proper evidence, not only of the preſent rent of the lands out of which the tithes to be valued are payable, but alſo of the rent which has been paid for theſe lands for ſeven years paſt; and if the tenants have been in uſe

to

to pay graſſum, theſe ſhould likewiſe be proved.

If any part of the lands are in the natural poſſeſſion of the heritor, a proof muſt be taken of the annual produce of ſuch lands, and what they would yield if let to a tenant. It is alſo neceſſary to have a clear proof of the value and expence of improvements made on all the lands within ſeven years preceding the taking of the proof; becauſe a reaſonable deduction will be allowed by the court for ſuch improvements in valuing the tithes; and, for the ſame reaſon, a diſtinct proof ſhould be taken of the rent of mills; and all legal deductions, either from the rents or tithes, ſhould alſo be proved.

The titular being liable to the payment of the King's annuity while he retains the property of the tithes, there is no deduction made upon that account in a proceſs of valuation; but there is a deduction given for it in a proceſs of ſale; and the purchaſer is decreed

creed to relieve the ſeller of the tithes of the ſaid annuity.

If the tithes have been valued ſeparately before 1633, a fifth part thereof muſt alſo be deducted in reckoning the price. This deduction is called the *King's eaſe.* Ch. I. P. 1633. c. 17.

The titular and patron reſpectively, ſhould be ordained to produce their title-deeds and rights to the tithes; becauſe the price is more or leſs according to theſe ſeveral rights; the titulars being intitled to *nine*, and the patron only to *ſix* years purchaſe: and in caſe there are ſeveral perſons pretending to have an intereſt in the tithes, ſuch as heritors and liferenters, titulars, patrons, or tackſmen, it ſhould be aſcertained by the court what ſhare each of the ſeveral patrons are to take of the price. Ib. c. 19. W. & M. p. 1690. c. 23

§ 2. *Proceſs of Modification and Locality.*

The action in this court, at the inſtance of a miniſter for his ſtipend, conſiſts of two diſtinct branches;

branches; one a modification, the other a locality. The effect of the firſt of theſe is to have the quantum of the ſtipend aſcertained; the effect of the other is to rate the proportion to be paid out of each heritor's tithes.

Beſides the ſtipend to the miniſters, there is commonly a ſum modified for defraying the expence of communion-elements, which is more or leſs, according to the number of people in the pariſh; and ſeldom exceeds L. 5 Sterling.

In this proceſs, the miniſter generally gives in a rental of the lands liable to tithes in his pariſh, and refers the verity thereof to the reſpective oaths of ſuch of the defenders as are of age, and brings a proof of the rents of the lands of ſuch of them as are minors.

A. S. 14th Feb. 1739 When an act is pronounced for taking this proof, the court aſſigns the ſame term to the heritors to produce their ſeveral rights to their teinds, with certification.

This

This certification has little or no effect, there being no penalty annexed to it; by which means theſe cauſes are often extremely tedious.

Though the two concluſions in this action are contained in one libel, yet a decreet may be obtained in the modification, without proceeding to the locality; the effect of which is, to make the ſtipend a real lien on the tithes of the whole pariſh, and to ſubject the intromitters with the tithes *in ſolidum* to payment of the ſtipend, to the amount of their ſeveral intromiſſions; but after a decreet of locality is extracted, each heritor is only liable for his own proportion.

The titular having been originally proprietor of all the tithes of the pariſh, he had power to allocate the ſtipend upon any part of the tithes he pleaſed, unleſs he was barred from making ſuch allocation by ſome deed of his own, ſuch as a tack, or diſpoſition of the tithes, in favour of ſome other

perſon. This privilege was alſo extended to patrons having right to tithes by the acts 1690 and 1693. When the privilege of purchaſing their own tithes was given to heritors, the titulars and patrons, and their tackſmen, were in uſe to diſappoint the heritors, by allocating their tithes to the miniſters. To remedy this inconvenience, by the commiſſion 1693

W. & M. p. 1693. c. 24. "it is ſtatute and ordained, That after citation, it ſhall not be in the power of the patrons, titulars, or tackſmen, to make an allocation of the purſuer's teinds ſolely, but only proportionally of his and the other teinds within the pariſh, and within his right; excepting always, that the teinds of the lands belonging in property to the patron, titular, or tackſmen, ſhall be free of any part of the allocation, if there be ſufficient teind beſides."

The order obſerved in allocating the ſtipend is as follows:

1. Free tithes payable to the titular

tular or patron, reſpectively, out of other heritors lands.

2. The tack-duties payable to the titular or patron reſpectively, for tithes let by them, and alſo the feu-duties, if any be, payable to the titular or patron for tithes feued by them.

3. Tithes of other heritors lands, let in tack by the titular or patron reſpectively.

4. Tithes heritably diſponed by the titular or patron, and the tithes of the lands belonging to the titular or patron proportionally.

The *decimæ incluſæ*, which have been diſponed by churchmen, with the ſtock, before 1587, are not ſubjected to the burden of the miniſter's ſtipend, and therefore cannot be localled.

The clerk uſually makes out the calcul and ſcheme of allocation, without previouſly ſhewing to the parties a ſtate of the order on which it is to proceed, which is often the occaſion of much trouble and expence. If ſuch ſtate were

to be made out, and an order given by the Lord Ordinary to all parties to ſee and object to it, previous to the making of the calcul, all that unneceſſary trouble and expence might be ſaved, eſpecially if a certification were granted *contra non producta.*

§ 3. *Proceſs of Prorogation of a Tack.*

The proceſs of prorogation of tacks may either proceed on a ſummons, or the decreet of prorogation may be inſiſted for in the proceſs of modification and locality, where all parties having intereſt are called; in which caſe, a ſummons has been found not to be neceſſary.

Vide Forbes on Tithes, c. 7. § 5.

In this proceſs, the time of prorogation is granted in proportion to the loſs ſuſtained by the tackſman; and, for that reaſon, the court, before pronouncing a decree, often remits to an accountant to make out a calcul of the loſs, and of the number of years which ought

ought to be granted for the tackſman's indemnification.

When an augmentation of a miniſter's ſtipend has proceeded on a voluntary agreement between the patron and miniſter, it has been decided by the houſe of Lords, that the tackſman is not intitled to a prorogation on that account. June 1733 Earl of Galloway againſt the Heritors of Whithorn

The other actions in this court having nothing in their form of proceeding peculiar to them, it will ſuffice to refer to what has been already ſaid upon that head in the former part of this treatiſe.

PART III.

Of Extracts.

THERE is no minute-book kept of the proceedings of this court: the only regulations made by the court with respect to extracts is, "That no act or decreet can be extracted, "until the Lords shall have met "another diet after pronouncing "thereof."

A. S. 11th June 1707

If a party is possessed of an extract of a decreet before 1707, he may apply to the court by petition to have it recorded; and upon giving in the old extract, he is intitled to get a new one *gratis*.

Anne, p. 1707, c. 9.

FINIS.